(18,907.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 267.

CLARENCE T. BIRKETT, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 6th day of March, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur March 7, 1903.

2 COLUMBIA BANK, Respondent,
ag'st
CLARENCE T. BIRKETT, Appellant.

Be it remembered, that on the 20th day of February in the year of our Lord one thousand nine hundred and two Clarence T. Birkett the appellant in this action came here into the court of appeals, by Thomas Carmody his attorney, and filed in the said court a notice of appeal and return thereto from the order & judgement of the appellate division of the supreme court in and for the first judicial department. And Columbia Bank, the respondent in said action, afterwards appeared in said court of appeals by I. S. Isaacs its attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

3 Whereupon, the said court of appeals having heard this cause argued by Mr. J. Murray Downs of counsel for the appellant, and by Mr. Julius J. Frank of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgement of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

4 Therefore, it is considered that the said judgement be affirmed with costs as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *March* 7, 1903.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

5 STATE OF NEW YORK:

Court of Appeals.

COLUMBIA BANK, Respondent,
against
CLARENCE T. BIRKETT, Appellant.

Appeal Book.

I. S. Isaacs, attorney for respondent, 27 Pine St., New York.
Thomas Carmody, attorney for appellant, Penn Yan, N. Y.
John Willett, of counsel, 30 Broad St., New York.

6 Court of Appeals.

COLUMBIA BANK, Respondent,
against
CLARENCE T. BIRKETT, Appellant.

This action was commenced on the 21st day of May, 1900, by the service of summons and complaint. The answer was served June 9, 1900. The action was brought to trial before Hon. John Proctor Clarke, justice of the supreme court, at a trial term of the supreme court, part II, held in and for the county of New York on the 20th day of February, 1901. A jury was waived by both parties.

On the 8th day of March, 1901, a decision in favor of the plaintiff and against the defendant, directing judgment as hereinafter stated, was duly filed by the court. On the 9th day of March, 1901, judgment was duly entered in favor of the plaintiff and against the defendant, for the sum of $961.06.

On the 21st day of March, 1901, a notice of appeal to the appellate division of the supreme court for the first judicial department was served by the attorney for the defendant upon the attorney for the plaintiff. The appeal was subsequently argued before the appellate division, and thereafter, and on the 12th day of November, 1901, the appellate division affirmed the judgment appealed from, and judgment of affirmance was entered in the New York county clerk's office on the 13th day of November, 1901.

7 Notice of appeal to the court of appeals was filed and served on the 6th day of December, 1901.

The above are the names of the original parties in full, and no change has taken place pending suit. Dated Penn Yan, N. Y., December 31, 1901.

THOMAS CARMODY,
Attorney for Defendant, Penn Yan, N. Y.

Supreme Court, County of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of New York.

Dated New York, May 15, 1900.

I. S. ISAACS,
Plaintiff's Attorney.

Office and post office address, 27 and 29 Pine street, borough of Manhattan, New York city.

8 Supreme Court, County of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

The plaintiff complains of the defendant, and alleges, on information and belief:

I. That the plaintiff is, and at all the times hereinafter mentioned was, a domestic corporation, organized under the laws of the State of New York, transacting the business of banking in the city of New York.

II. That, at the time hereinafter mentioned, until the death of said Russell, defendant and one Calvin Russell were co-partners, doing business under the firm name and style of Russell & Birkett.

III. That, on or about the 15th day of February, 1899, the defendant and said Calvin Russell, in their said firm name, for value received, made and delivered their promissory note to the order of Manhattan Railway Advertising Co., whereby they promised, on

April 5th after date thereof, to pay to the order of said Manhattan Railway Advertising Co. the sum of seven hundred and fifty and no one-hundredths dollars at Columbia bank, New York.

IV. That thereafter, and before maturity of said note, said Manhattan Railway Advertising Co. duly endorsed said note, and the same, so endorsed, was, before maturity, delivered for value to the plaintiff, which is now the lawful owner and holder of said note.

V. That thereafter, and prior to the commencement of this action, the said Calvin Russell died.

VI. That no part of said note has been paid.

Wherefore, plaintiff demands judgment against the defend-
9 ant for seven hundred and fifty and no one-hundredths dollars ($750.00), with interest thereon from April 5, 1899, and the costs of this action.

I. S. ISAACS,
Attorney for Plaintiff.

Office and post office address, No. 27 Pine street, Manhattan borough, New York city.

(Verified May 15, 1900.)

Supreme Court, County of New York.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

The defendant, answering the plaintiff's complaint herein:—

I. Admits the allegations contained in the plaintiff's complaint.

II. This defendant, further answering said complaint, alleges that on or about the 15th day of April, 1899, and after the execution and delivery of the note mentioned in the complaint herein, the firm of Russell & Birkett, makers of said note, as co-partners, and Calvin Russell and this defendant, individually, who were the members of said firm of Russell & Birkett, filed their petition in bankruptcy in the United States district court for the northern district of New York, and were on that day duly adjudged bankrupts, pursuant to the provisions of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States,"
10 approved July 1, 1898; that thereafter, and on or about the 3d and 4th days of May, 1899, before Hon. Charles A. Hawley, referee in said bankruptcy proceedings and having jurisdiction thereof, a meeting of the creditors of said Russell & Birkett, and of the individual members thereof, was held at the village of Penn Yan, Yates county, N. Y., at which all persons having claims against the said firm of Russell & Birkett, or against the individual members thereof, were permitted to prove, and did prove, their claims as creditors in such bankruptcy proceedings. This defend-

ant further alleges, upon information and belief, that the said note mentioned in plaintiff's complaint, and constituting the plaintiff's cause of action herein, was duly presented before said referee in such proceedings, as a claim against the estate of said Russell & Birkett; that thereafter, and on or about the 12th day of September, 1899, at a term of the United States district court for the northern district of New York, held at the city of Utica, Hon. Alfred C. Coxe presiding, being the court having jurisdiction of said bankruptcy proceedings, the said firm of Russell & Birkett, co-partners, and this defendant individually, were duly discharged in said bankruptcy proceedings, pursuant to the provisions of the act of Congress above mentioned, and that, by such discharge, the said firm of Russell & Birkett, and this defendant individually, were duly discharged from all debts, claims, and obligations existing against them, or either of them, on said 15th day of April, 1899.

III. This defendant further alleges that the indebtedness alleged in the plaintiff's complaint accrued before the said 15th day of April, 1899, and was provable against the estate of the said Russell & Birkett in the bankruptcy proceedings hereinbefore set forth, and that, by the discharge of the said Russell & Birkett, and of this defendant individually, in said bankruptcy proceedings hereinbefore set forth, they, and each of them, as co-partners and individuals, were released and discharged from the payment of said claim, or any portion thereof, except as the same might be paid in the bankruptcy proceedings above referred to.

Wherefore, this defendant asks that the complaint herein be dismissed, with costs.

THOMAS CARMODY,
Attorney for Defendant.

Office and P. O. address, Penn Yan, N. Y.

(Verified June 9, 1900.)

Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

Notice of Findings.

Take notice that the decision, of which a copy is hereto annexed, was, on the 8th day of March, 1901, duly made and filed in the above-entitled action in the office of the clerk of the county of New York, and that on the 9th day of March, 1901, the same was duly annexed to and filed with the judgment roll herein, and the judg-

ment, of which a copy is hereto annexed, was, on said last
12 mentioned date, duly entered and filed herein in the office of the clerk of the county of New York.

Dated New York, March 11, 1901.

Yours, &c.,

I. S. ISAACS,
Attorney for Plaintiff.

27–29 Pine street, borough of Manhattan, city of New York.

To Thomas Carmody, Esq., attorney for defendant.

Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

Findings.

The issues of fact under the pleadings herein coming on to be tried by the court at a trial term, part II, held by the undersigned, and a jury trial having been waived by both parties to this action in open court, and the defendant having thereupon, in open court, withdrawn the allegation of the answer that the promissory note in suit was presented and proved in the bankruptcy proceeding therein alleged, and the issues having been tried by the court, without a jury, on the 20th day of February, 1901, and the allegations and the evidence of the parties having been heard—

Now, after hearing Julius J. Frank, Esq., of counsel for the
13 plaintiff, and Thomas Carmody, Esq., of counsel for the defendant, and due deliberation having been had, I decide and find as follows:

Findings of Fact.

I. That plaintiff is, and at all the times hereinafter mentioned was, a domestic corporation, organized under the laws of the State of New York, transacting the business of banking in the city of New York.

II. That at the times hereinafter mentioned, until the death of the hereinafter-mentioned Russell, defendant and one Calvin Russell were co-partners, doing business under the firm name and style of Russell & Birkett.

III. That, on or about the 15th day of February, 1899, the defendant and said Calvin Russell, in their said firm name, for value received, made and delivered their promissory note to the order of Manhattan Railway Advertising Company, whereby they promised, on April 5th after date thereof, to pay to the order of said Manhattan Railway Advertising Company the sum of seven hundred and fifty dollars ($750), at Columbia bank, New York.

IV. That thereafter, and before maturity of said note, said Manhattan Railway Advertising Company duly endorsed said note, and the same, so endorsed, was, before maturity, delivered for value to the plaintiff, which was, and still is, the lawful owner and holder of said note.

V. That thereafter, and prior to the commencement of this action, said Calvin Russell died.

VI. That no part of said note has been paid.

VII. That, prior to the date of maturity of said note, the defendant, and the said firm of Russell & Birkett, the makers of said note, had actual knowledge of the fact that the plaintiff was then the owner and holder of the same.

14 VIII. That thereafter, to wit, on the 13th day of April, 1899, said firm of Russell & Birkett, and this defendant, upon their own petition, were adjudicated bankrupts in the United States district court for the northern district of New York, and that, on September 12, 1899, said firm and said defendant were discharged in bankruptcy.

IX. That the claim of the plaintiff upon said promissory note, and the debt of said firm of Russell & Birkett, and of said defendant, upon said promissory note to the plaintiff, were not duly scheduled in time for proof and allowance, with the name of the plaintiff, which, at the time of filing their schedules in bankruptcy, was known to the bankrupts to be the owner and holder thereof, and the creditor of said bankrupt by reason thereof, and that such plaintiff had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy, prior to the discharge of the bankrupts therein.

X. That no notice of any of said proceedings in bankruptcy was at any time given to the plaintiff by, or by the direction of, said bankrupts, or either of them.

Conclusions of Law.

I. That the claim of the plaintiff, upon said promissory note, was not, and is not, barred or discharged by the defendant's said discharge in bankruptcy.

II. That there is now due and owing to the plaintiff from the defendant upon said promissory note the sum of seven hundred and fifty (750) dollars, with interest thereon from April 5, 1899, amounting to date to eighty-six and sixty-three one-hundredths (86.63) dollars, in all eight hundred and thirty-six and sixty-three one-hundredths dollars.

15 I accordingly direct judgment for the plaintiff against the defendant for eight hundred and thirty-six and sixty-three one hundredths dollars, together with an extra allowance of five (5) per cent. upon said amount, with costs, to be taxed.

JOHN PROCTOR CLARKE, *J. S. C.*

Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

Judgment.

The issues in this action having been regularly brought on for trial before Mr. Justice John Proctor Clarke, at a trial term, part II, of this court, held on the 20th day of February, 1901, at the New York county court house, in the borough of Manhattan, city of New York, and the court having heard the allegations and proofs of the parties, and the arguments of counsel, after due deliberation having duly made and filed, on the 8th day of March, 1901, a decision in favor of the plaintiff, against the defendant, containing a statement of the facts found, and the conclusions of law thereon, and directing judgment as hereafter stated, and the plaintiff's costs having been duly adjusted at the sum of one hundred and twenty-four and forty-three one-hundredths (124.43) dollars.

Now, on motion of I. S. Isaacs, attorney for plaintiff, it is—

Adjudged, that the plaintiff do recover judgment against
16 the defendant for eight hundred and thirty-six and sixty-three one-hundredths (836.63) dollars, principal and interest, together with one hundred and twenty-four and forty-three one-hundredths (124.43) dollars cost, including an extra allowance of five (5) per cent. upon said amount, in all nine hundred and sixty-one and six one-hundredths dollars, and that said plaintiff have execution therefor against said defendant.

Judgment signed and entered this 9th day of March, 1901.

WILLIAM SOHMER, *Clerk.*

Memoranda of Opinion by Clarke, J.

COLUMBIA BANK
vs.
BIRKETT.

This is an action on a promissory note. Defense a discharge in bankruptcy. Plaintiff seeks to avoid effect of discharge upon the ground that, under the provisions of subdivision 3 of section 17 of the bankruptcy act of 1898, this debt was not discharged because it was not duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt." The debt was scheduled, but the name of the creditor was not. The name in the schedule was the original payee. The proof established the fact that bankrupt knew plaintiff was holder of the note in question, and had applied for extension of time for payment from it. Plaintiff

received no notice of the bankruptcy proceedings, and acquired no knowledge thereof until long after the discharge pleaded and proved.

"The defendant had no right to altogether ignore the plaintiff
17 and his demand, unless he intended, as the act proclaims, that the plaintiff should not be bound by the proceedings in which he was so ignored." (Tyrrel *vs.* Hammerstein, 33 Misc., 505.) Judgment directed for the plaintiff for $750, with interest from April 5, 1899, costs, and extra allowance of five per cent. Submit findings.

Supreme Court, New York County.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

Amended Exceptions.

The defendant, Clarence T. Birkett, excepts to the findings of fact and conclusions of law of the court herein, filed in the office of the clerk of the county of New York on the 9th day of March, 1901, as follows:

I. He excepts to so much of the ninth finding of fact therein in which the court finds "that the claim of the plaintiff upon said promissory note, and the debt of said firm of Russell & Birkett, and of said defendant, upon said promissory note to the plaintiff, were not duly scheduled in time for proof and allowance, with the name of the plaintiff, which, at the time of filing their schedules in bankruptcy, was known to the bankrupts to be the owner and holder thereof," upon the ground that said finding of fact is not supported by the evidence, and is against the weight of evidence.

II. He excepts to so much of the ninth finding of fact
18 therein in which the court finds that the plaintiff was the creditor of the defendant at the time when the defendant's schedules in bankruptcy were filed, upon the ground that said finding of fact is not supported by the evidence, and is against the weight of evidence.

III. He excepts to so much of the ninth finding of fact therein in which the court finds that the "plaintiff had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy prior to the discharge of the bankrupts therein," upon the ground that said finding of fact is not supported by the evidence, and is against the weight of evidence.

IV. He excepts to so much of the tenth finding of fact in which the court finds "that no notice of any of said proceedings in bankruptcy was at any time given to the plaintiff by, or by the direction of, said bankrupts, or either of them," upon the ground that said finding of fact is not supported by the evidence, and is against the weight of evidence.

V. He excepts to so much of the first conclusion of law in which

the court finds "that the claim of the plaintiff upon said promissory note was not, and is not, barred or discharged by the defendant's said discharge in bankruptcy."

Dated at Penn Yan, N. Y., this 20th day of March, 1901.

THOMAS CARMODY,
Attorney for Defendant.

Office and P. O. address, Penn Yan, N. Y.

19 Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

Notice of Filing.

To I. S. Isaacs, Esq., attorney for plaintiff, 27 Pine St., New York city.

SIR: Please take notice that the foregoing notice of exceptions to the report and findings of the court herein has been filed at the office of the clerk of the county of New York on the 21st day of March, 1901.

Dated at Penn Yan, N. Y., this 21st day of March, 1901.

THOMAS CARMODY,
Attorney for Defendant.

Office and P. O. address, Penn Yan, N. Y.

Supreme Court, New York County.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

Notice of Appeal.

20 SIR: You will please take notice that the defendant, Clarence T. Birkett, hereby appeals to the appellate division, first department from a judgment of this court entered in the office of the clerk of the county of New York on the 9th day of March, 1901, for the sum of nine hundred sixty-one dollars and six cents ($961.06), damages and costs.

Dated at Penn Yan, N. Y., March 19, 1901.

Yours, &c.,
THOMAS CARMODY,
Attorney for Defendant.

Office and P. O. address, Penn Yan, N. Y.

To I. S. Isaacs, Esq., plaintiff's attorney, 27 Pine St., New York, and to William Sohmer, Esq., clerk of the county of New York.

Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

This action came on for trial at a trial term of the supreme court, part II, held in and for the county of New York, on the 20th day of February, 1901, before Hon. John Proctor Clarke, justice of the supreme court.

Plaintiff appeared upon the trial by Julius J. Frank, his counsel. Defendant appeared upon the trial by Thomas Carmody, his attorney, and John Willett, of counsel.

21 Jury waived by both parties.

Plaintiff moves for judgment upon the pleadings, upon the ground that, the defendant claiming the benefit of section 17 of the bankruptcy act of 1898, which section contains an exception to the operation of a discharge in bankruptcy, the defendant must plead and prove facts negativing the exeeption. There is no averment that the debt in question was duly scheduled with the name of the plaintiff, or that plaintiff's name was not known to the bankrupts, or that plaintiff had notice or actual knowledge of the proceedings in bankruptcy.

Defendant's counsel states that it will not be claimed by the defendant here that the note was presented. That was an error. The defendant will not be able to prove that the note was presented.

Counsel argue the motion for judgment.

The COURT: Is there any defense to the case?

Mr. CARMODY: We wish to introduce the schedules and notice to the payee.

The COURT: I think we had better take that, so as to put in the case, and the decision on the question of law will be reserved. I will take whatever evidence you have. The making of the note and the amount due is conceded, is it not?

It is conceded that the amount due upon the note upon which the suit was brought is $750 principal, and $84.38 interest, making a total of $834.38.

22 The plaintiff rested.

Mr. Carmody, on behalf of the defendant, offered in evidence an adjudication in bankruptcy in the United States district court, for the northern district of New York, in the matter of Russell & Birkett, co-partners, and Calvin Russell and Clarence T. Birkett, individually, bankrupts, made on the 13th day of April, 1899.

Received, and marked "Exhibit A."

Mr. Carmody, on behalf of the defendant, offered in evidence a discharge in bankruptcy in the matter of Calvin Russell and Clarence T. Birkett, as co-partners under the name of Russell & Birkett, and Calvin Russell and Clarence T. Birkett, individually, dated the 12th day of September, 1899.

Received, and marked "Exhibit B."

CLARENCE T. BIRKETT, being duly sworn as a witness on behalf of the defendant, testified as follows:

I am the defendant. I was a member of the firm of Russell & Birkett, formerly of Penn Yan, N. Y.

Witness identifies schedules of the firm of Russell & Birkett in bankruptcy, filed in the United States district court April 13, 1899. Offered in evidence.

Same objection, ruling and exception.

Papers marked "Exhibit C."

From said schedules Mr. Carmody read in evidence from Schedule A (3), No. 32, of the liabilities of Russell & Birkett as follows: "Manhattan Railway Advertising Company, New York city. A promissory note dated February 15, 1899, due April 5, 1899, for the sum of $750." Received.

23 WITNESS: This is the note in suit here. The usual notice to creditors was mailed to the Manhattan Railway Advertising Company of the first meeting of creditors of Russell & Birkett.

Witness identifies notice. Notice offered in evidence by defendant. Received and marked, "Exhibit D."

Mr. Carmody offered in evidence a letter from The Columbia Bank, the plaintiff, to M. L. Baldwin, president of Baldwin's Bank of Penn Yan, N. Y., and Mr. Baldwin's answer thereon, as follows, the answer of Mr. Baldwin being written at the bottom of the letter from the plaintiff:

Columbia bank, Fifth avenue and 42d St.

NEW YORK, *Nov.* 6, 1899.

M. L. Baldwin, Esq., president Baldwin's Bank of Penn Yan, Penn Yan, N. Y.

DEAR SIR: Messrs. Russell & Birkett, of your city, who failed some time ago, are indebted to us in the sum of seven hundred and fifty dollars ($750) for a note we discounted.

We understood some little time ago that they were about to reorganize their business, and form a corporation, and were to give their creditors stock in the newly-organized company for their indebtedness.

Will you kindly inform us if these people have gone on in business, and, if not, what condition their affairs are in.

Thanking you in advance, and holding ourselves in readi-
24 ness to reciprocate the favor at any time, I remain,

Very truly yours, JOSEPH FOX, *Pres't.*

Mr. Baldwin's answer appears at the bottom of said letter, as follows:

"They have been through bankruptcy, and now C. T. Birkett, one of the old firm, is carrying on the business same as formerly. Doing a big business.

11-9-99 M. L. BALDWIN."

Received, and marked "Exhibit E."

Mr. Carmody offered in evidence a letter dated November 17, 1899, from the Columbia bank to M. L. Baldwin, Esq., president of Baldwin's Bank of Penn Yan, N. Y., and Mr. Baldwin's answer thereto, as follows:

Columbia bank, Fifth avenue and 42d St.

NEW YORK, *Nov.* 17, 1899.

M. L. Baldwin, Esq., president Baldwin's Bank of Penn Yan, Penn Yan, N. Y.

DEAR SIR: I received your reply to my letter of the 6th instant, for which I thank you, and desire to trouble you again, namely, to ask you in which district Russell & Birkett passed through bankruptcy, as we were not aware, and never received notification, that any such proceedings had taken place.

Thanking you again for the trouble I am putting you to, and always ready to reciprocate the favor, I remain,

Very truly yours, JOSEPH FOX, *Pres't.*

25 Mr. Baldwin's answer appears at the bottom of said letter, as follows:

"Northern district, N. Y. Charles A. Hawley, referee, Seneca Falls, N. Y. 11–18–99."

Received, and marked "Exhibit F."

It was conceded that Joseph Fox, who signed the above two letters, was at the time, and still is, the president of the plaintiff.

Cross-examination of Mr. BIRKETT by Mr. FRANK:

Witness shown letter dated March 27, 1899, addressed to Messrs. Russell & Birkett, Penn Yan, N. Y., and signed Manhattan Railway Advertising Company.

WITNESS: I received that letter at or about the time of its date.

Letter offered in evidence. Received, and marked "Exhibit 1," which is as follows:

Manhattan Railway Advertising Co., 30, 32, 34, 36 Park place, corner Church St.

NEW YORK, *March* 27, 1899.

Messrs. Russell & Birkett, Penn Yan, N. Y.

GENTLEMEN: Your favor of the 25th instant to hand, enclosing note maturing May 5th, $750, and exceedingly regret to learn of your misfortune in consequence of the damage sustained by fire to your mills. However, it is gratifying to know that you are fully covered by insurance, and trust your business will not be delayed in consequence.

26 Relative to the extension of your note now held by the Columbia bank, wish to say that we notified the president relative thereto, and he positively declines to grant another extension, notwithstanding our entreaties in your behalf. On the original extension it was granted only after considerable persuasion on our part, and you can readily see our position in the matter, as it is entirely out of our hands, and solely controlled by the bank now holding the note, and we therefore have to abide by their decision.

We regret we cannot aid you as much as we would like to, but it does not lay in our power to do so.

We return enclosed herewith note you sent us, and trust the time you have now prior to maturity will be ample for you to make provision for the payment of note now held by the bank, which matures April 5th.

Regretting our inability to be of service to you in this instance, we are,

Yours very truly,

MANHATTAN RAILWAY ADV. CO.

WITNESS: This note, which was referred to in this letter, and which matured April 5th, we obtained an extension on from the Columbia bank to the 12th of April.

Letter, produced by plaintiff, shown witness, dated April 4, 1899, signed Russell & Birkett, by C. T. Birkett.

WITNESS: That is my signature.

Letter offered in evidence. Received, and marked "Exhibit 2," and is as follows:

27 PENN YAN, N. Y., *April* 4, 1899.

The Columbia bank, New York city.

GENTLEMEN: Providing you will hold our note for $750, due at your bank to-morrow, April 5, 1899, without protest, until the 12th instant, we will endeavor to pay the same. Possibly before that date.

Yours truly,

RUSSELL & BIRKETT.
C. T. BIRKETT.

WITNESS: We filed our petition in bankruptcy on the 12th or 13th of April; the 13th of April, 1899, I think, we were adjudicated. That letter (referring to Exhibit 2), was not mailed to the Columbia bank.

By the COURT:

Q. I understood it was a letter to the Columbia bank?
A. It was not mailed to the Columbia bank.

By the COURT:

Q. It was addressed to them?
A. Yes, addressed to them.

By Mr. FRANK:

Q. You intended it to de delivered to the Columbia bank, didn't you?

A. It was immaterial to us to whom it was delivered.

By the COURT:

Q. The request was made to the Columbia bank, wasn't it?

A. No, the request was not made to the Columbia bank. It was made to the Manhattan Railway Advertising Co.

28 By the COURT:

Q. Who was it addressed to?

A. It was addressed to the Columbia bank.

By the COURT: It shows knowledge on his part. The purpose of it is that he knew the Columbia bank held this note.

Testimony closed.

By Mr. FRANK: Your honor will consider that we renew the motion for judgment made at the opening of the case.

By Mr. CARMODY: I make a motion to dismiss the complaint on all the evidence.

Decision reserved. Briefs to be submitted.

THOMAS CARMODY,
Attorney for Defendant.

Office and P. O. address, Penn Yan, N. Y.

EXHIBIT A.

In Bankruptcy. No. 942.

In the District Court of the United States for the Northern District of New York.

In the Matter of RUSSELL & BIRKETT, Co-partners, and CALVIN RUSSELL and CLARENCE T. BIRKETT, Individually, Bankrupts.

29 At Utica, N. Y., in said district, on the 15th day of April, A. D., 1899, before the Hon. Alfred C. Coxe, judge of said court in bankruptcy, the petition of Russell & Birkett, co-partners, and Calvin Russell and Clarence T. Birkett, individually, that Russell & Birkett, co-partners, and Calvin Russell and Clarence T. Birkett, individually, be adjudged a bankrupt within the true meaning and intent of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Russell & Birkett, co-partners, and Calvin Russell and Clarence T. Birkett, individually, is hereby declared and adjudged bankrupt accordingly.

Witness the Hon. Alfred C. Coxe, judge of said court, and
[L. S.] the seal thereof, at the city of Utica, in said district, on th
15th day of April, A. D., 1899.

CHARLES B. GERMAIN, *Clerk.*

Attest: CHARLES B. GERMAIN, *Clerk.*

A. C. C.

EXHIBIT B.

In Bankruptcy. No. 942.

Discharge of Bankrupt.

District Court of the United States for the Northern District of New York.

In the Matter of CALVIN RUSSELL and CLARENCE T. BIRKETT, as Co-partners under the Firm Name of RUSSELL & BIRKETT, and CALVIN RUSSELL and CLARENCE T. BIRKETT, Individually, Bankrupts.

30 Whereas, Calvin Russell and Clarence T. Birkett, as co-partners under the firm name of Russell & Birkett, and Calvin Russell and Clarence T. Birkett, individually, of Penn Yan, in the county of Yates and State of New York, have been duly adjudged bankrupts under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and appears to have conformed to all the requirements of law in that behalf. It is, therefore—

Ordered, by the court, that said Calvin Russell and Clarence T. Birkett, as co-partners under the firm name of Russell & Birkett, and Calvin Russell and Clarence T. Birkett, individually, be forever discharged from all debts as co-partners and as individuals, and claims which by said act are made provable against their estate, and which existed on the 13th day of April, 1899, on which day the petition for adjudication was filed, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at the city of Utica, N. Y., in said district, this 12th day of September, A. D. 1899.

[L. S.] A. C. COXE, *Judge.*

Attest: CHARLES B. GERMAIN, *Clerk.*

EXHIBIT C.

SCHEDULE A (3), No. 32.—*Creditors Whose Claims Are Unsecured.*

(N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

RUSSELL & BIRKETT.

Reference to ledger or voucher.	Names of creditors and last holders known to debtors.	Residence, (if unknown, that fact must be stated.)	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner, or joint contractor with any other person, and, if so, with whom.	Amount.
None..... ...	Manhattan Railway Advertising Co.	New York city, N. Y.	Feb. 15, '99, Penn Yan, N.Y.	Advertising performed by creditors, and for which creditors hold debtors' note dated Feb'y 15, '99, due April 5, 1899, in the sum of $750.	$750.00

CALVIN RUSSELL,
CLARENCE T. BIRKETT, } *Petitioners.*

32 EXHIBIT D.

In Bankruptcy. No. 942.

In the District Court of the United States for the Northern District of New York.

In the Matter of RUSSELL & BIRKETT, Co-partners, and CALVIN RUSSELL and CLARENCE T. BIRKETT, Individually, Bankrupts.

To the creditors of Calvin Russell and Clarence T. Birkett, individually and as co-partners, lately doing business under the firm name and style of Russell & Birkett, of Penn Yan, in the county of Yates and district aforesaid, bankrupts:

Notice is hereby given that on the 15th day of April, 1899, the said Russell & Birkett, co-partners, and Calvin Russell and Clarence T. Birkett, individually, were duly adjudged bankrupts, and that the first meeting of their creditors will be held at the chambers of the county judge, in the county building, Penn Yan, Yates county, N. Y., on the 2d day of May, 1899, at 10 o'clock in the forenoon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

Dated April 17, 1899.

CHARLES A. HAWLEY,
Referee in Bankruptcy.

33 The foregoing case and exceptions, containing all the evidence, is hereby settled, signed, and ordered filed in the office of the clerk of the county of New York.

Dated Penn Yan, N. Y., April 16, 1901.

JOHN PROCTOR CLARKE,
Justice of the Supreme Court.

Supreme Court, Appellate Division, First Judicial Department.

COLUMBIA BANK, Respondent,
against
CLARENCE T. BIRKETT, Appellant.

It is hereby stipulated by and between the attorneys for the respective parties in this action that the foregoing are true and correct copies and of the whole of each thereof, of the summons, complaint, answer, findings of fact, judgment, case and exceptions, opinion of the court, and notice of appeal, and that the same may be used upon the appeal to the appellate division of the supreme court herein, with the same force and effect in all respects as if duly and properly

certified by the clerk of New York county to be such copies as aforesaid, such certification being specifically waived.

Dated Penn Yan, N. Y., March 21, 1901.

I. S. ISAACS,
Attorney for Plaintiff-Respondent.
THOMAS CARMODY,
Attorney for Defendant-Appellant.

34 It is hereby consented that the foregoing printed case on appeal may be ordered on file as and for the original case on appeal, as settled herein.

Dated Penn Yan, N. Y., April —, 1901.

I. S. ISAACS,
Attorney for Plaintiff-Respondent.
THOMAS CARMODY,
Attorney for Defendant-Appellant.

It is so ordered.

Dated New York, April —, 1901.

JOHN PROCTOR CLARKE, *J. S. C.*

Endorsed: (" Filed April —, 1901.")

Supreme Court.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

Take notice that an order, of which the within is a copy, was, on the 12th day of November, 1901, duly entered and filed in the office of the clerk of the appellate division of the supreme court, first department, and that a certified copy thereof, transmitted according to law to the county clerk of the county of New York, was, on the 13th day of November, 1901, duly filed in said clerk's office.

Dated New York, Nov. 13, 1901.

Yours, &c.,

I. S. ISAACS,
Plaintiff's Attorney.

27–29 Pine street, New York city.

To Thomas Carmody, Esq., defendant's attorney.

35 At a term of the appellate division of the supreme court, first department, held at the appellate division court house, in the county of New York, on the 8th day of November, 1901.

Present: Hon. C. H. Van Brunt, P. J., Hon. Edward Patterson, Hon. George Ingraham, Hon. Edward W. Hatch, Hon. Frank C. Laughlin, J. J.

COLUMBIA BANK, Plaintiff-Respondent,
against
CLARENCE T. BIRKETT, Defendant-Appellant.

The defendant having appealed to the appellate division, supreme court, first department, from the final judgment herein, entered in the office of the clerk of the county of New York, the 9th day of March, 1901, and said appeal duly coming on to be heard—

Now, after hearing Mr. Willett, of counsel for the appellant, in support of said appeal, and Mr. Frank, of counsel for respondent, in opposition thereto, and due deliberation having been had thereon, it is, on motion of I. S. Isaacs, Esq., attorney for respondent—

Ordered, that the judgment so appealed from be, and the same hereby is, affirmed, with costs to the respondent.

WILLIAM SOHMER, *Clerk*.

36 Supreme Court.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

The defendant having appealed to the appellate division of the supreme court, first department, from a judgment of the supreme court herein, entered in the office of the clerk of the county of New York on the 9th day of March, 1901, and said appellate division of the supreme court having duly made an order dated November 8, 1901, and entered November 12, 1901, affirming said judgment, with the costs of said appeal to the plaintiff-respondent, and a certified copy of said order, transmitted according to law, having been duly filed in the office of the clerk of said county, and respondent's costs having been taxed this day at the sum of one hundred and one and seventy-two one-hundredths dollars—

Now, on motion of I. S. Isaacs, Esq., attorney for the plaintiff, it is—

Adjudged, that the judgment so appealed from be, and the same hereby is, affirmed, and that the plaintiff, Columbia Bank, recover of the defendant, Clarence T. Birkett, the sum of one hundred and one and seventy-two one-hundredths dollars, costs, and that said plaintiff have execution therefor.

Judgment signed and entered November 13, 1901.

[SEAL.] WILLIAM SOHMER, *Clerk*.

37 Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

YATES COUNTY, *ss:*

Thomas Carmody, being duly sworn, says: He is the attorney for the defendant in the above-entitled action; that no opinion was written by the appellate division on the decision of the above case on appeal therein.

THOMAS CARMODY.

Sworn to before me this 19th day of December, 1901.

KATHLEEN L. CAVISTON,
Notary Public.

New York Supreme Court, New York County.

COLUMBIA BANK, Plaintiff-Respondent,
against
CLARENCE T. BIRKETT, Defendant-Appellant.

Notice of Appeal to the Court of Appeals.

Take notice that the above-named defendant hereby appeals to the court of appeals from the order of the appellate division of the supreme court, first department, in this action, entered in the office of the clerk of said court on the 8th day of November, 1901, and from the judgment of this court entered in the office of the
38 clerk of the county of New York on the 13th day of November, 1901, which said order and judgment affirmed the judgment entered herein in favor of the plaintiff on the 9th day of March, 1901, and from each and every part of said order and judgment.

Dated New York, December 6, 1901.

Yours, &c.,
THOMAS CARMODY,
Attorney for Defendant-Appellant.

Office and P. O. address, Penn Yan, N. Y.

To the clerk of the county of New York.
To I. S. Isaacs, Esq., attorney for plaintiff-respondent, 27 Pine St., New York.

Court of Appeals.

COLUMBIA BANK, Respondent,
against
CLARENCE T. BIRKETT, Appellant.

It is hereby stipulated and agreed by and between the attorneys for the respective parties in this action, that the foregoing are true and correct copies, and of the whole of each thereof, of the summons, complaint, answer, notice of findings, findings of fact and conclusions of law, judgment, memoranda of opinion by Clarke, J., at the trial term, amended exceptions to findings and notice of filing, notice of appeal to the appellate division, case and exceptions,
39 stipulation to case at appellate division, order of affirmance in appellate division, and notice of entry and filing, judgment of affirmance and notice thereof in appellate division, and notice of appeal to the court of appeals, and that the same may be used upon the appeal to the court of appeals herein with the same force and effect in all respects as if duly and properly certified by the clerk of the county of New York to be such copies as aforesaid, such certification being specifically waived.

Dated Penn Yan, N. Y., December 31, 1901.

I. S. ISAACS,
Attorney for Respondent.
THOMAS CARMODY,
Attorney for Appellant.

40 At a special term, part II, of the supreme court of the State of New York, held in and for the county of New York, at the New York county court house, in the borough of Manhattan, city of New York, on the 8th day of March, 1903.

Present: Honorable Samuel Greenbaum, justice.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

The defendant above named having appealed to the court of appeals from the order of the appellate division of the supreme court, first department, in this action entered in the office of the clerk of said court on the 8th day of November, 1901, and from the judgment of the supreme court herein entered in the office of the clerk of the county of New York on the 13th day of November, 1901, and said appeal having been duly heard by the court of appeals upon due notice of said appeal and the return thereof, and the court of appeals having on the 6th day of March, 1903, ordered and adjudged that the judgment of the appellate division of the supreme court appealed from, be affirmed with costs to plaintiff, and having directed the record aforesaid and the proceedings in said court of

appeals to be remitted to this court hereto be proceeded upon according to law,

41 Now, on filing the remittitur of the court of appeals herein, dated March 7th, 1903, and

On motion of J. S. Isaacs, plaintiff's attorneys, it is

Ordered and adjudged that the order and judgment aforesaid of the court of appeals, be and the same hereby are made the order and judgment of this court, and that the judgment aforesaid entered upon the order of the appellate division of the supreme court, first department, in the office of the clerk of the county of New York, on the 13th day of November, 1901, be and the same hereby is, affirmed with costs of said appeal to the court of appeals, to the plaintiff above named to be taxed by the clerk of this court.

Enter.

S. G., *J. S. C.*

42 [Endorsed:] New York supreme court. Columbia Bank, plaintiff, *vs.* Clarence T. Birkett, defendant. Judgement order on remit-itur. I. S. Isaacs, 27 & 29 Pine St., New York city.

43 Supreme Court, County of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

The defendant above named having appealed to the court of appeals from the judgment in favor of the plaintiff entered upon the order of the appellate division of the supreme court, first department, herein in the office of the clerk of the county of New York on the 13th day of November, 1901, and the court of appeals having ordered that the said judgment appealed from be affirmed, and having sent down the remittitur to this court here to be proceeded upon according to law, and this court by order *fated* March 18th, 1903, and entered this day in the office of the clerk of the county of New York, having directed judgment to the following effect and plaintiff's costs of said appeal to the court of appeals having been taxed this day at the sum of one hundred and fifty-two dollars and 51/100,

Now, on motion of J. S. Isaacs, plaintiff's attorneys it is—

Adjudged that the judgment so appealed from be, and the same hereby is, affirmed and that the plaintiff Columbia Bank recover from the defendant Clarence T. Birkett the sum of one hud*n*red and fifty-two and 51/100 dollars costs, and the said plaintiff have execution therefor.

Judgment signed and entered, March 18th, 1903.

THOS. L. HAMILTON, *Clerk.*

44 [Endorsed:] New York supreme court, Columbia Bank plaintiff *vs.* Clarence T. Birkett defendant. Judgement of affirmance. I. S. Isaacs 27 & 29 Pine St. New York city.

45 COLUMBIA BANK, Respondent,
v.
CLARENCE T. BIRKETT, Appellant.

(Decided March 6, 1903.)

The action is upon a promissory note for $750; dated February 15th, 1899, and payable April 5th, 1899; made by the firm of Russell & Birkett, of which defendant is the surviving member, to the order of the Manhattan Railway Advertising Company and by the payee transferred to the plaintiff before maturity. Defendant set up in his answer the discharge of his firm in bankruptcy proceedings. The case being tried without a jury, findings of fact were made; which, after stating the formal facts of the making of the note, its acquisition by the plaintiff by indorsement of the payee, before maturity and for value, and its non-payment, proceeded to find that prior to the maturity of the note, the makers "had actual knowledge of the fact that plaintiff was then the owner and holder of the same;" that Russell & Birkett, upon their own petition, were adjudicated bankrupts on April 13th, 1899, and on September 12th, 1899, were discharged in bankruptcy; that "the claim of the plaintiff upon said promissory note and the debt of said firm of Russell & Birkett, and of said defendant, upon said promissory note to the plaintiff, were not duly scheduled in time for proof and allowance, with the name of the plaintiff, which, at the time of filing their schedules in bankruptcy, was known to the bankrupts to be the owner and holder thereof, and the creditor of said bankrupts by reason thereof, and that such plaintiff had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy, prior to the discharge of the bankrupts therein." It was, also, further found "that no notice of any of said proceedings in bankruptcy was at any time given to the plaintiff by, or by the direction of, said bankrupts, or either of them." As his legal conclusion, the trial judge found that the plaintiff's claim was not, and is not, barred, or discharged, and he directed judgment for the plaintiff. This judgment was affirmed by the appellate division, in the first department, and the defendant has appealed to this court.

J. Murray Downs, and Thomas Carmody, for appellant.

Julius J. Frank, and I. S. Issaacs, for respondent.

GRAY, *J.*:

The appellant does not dispute that the findings of fact are supported by the evidence; but he does dispute that they support the legal conclusion. Indeed, the evidence, upon which the finding as to the defendant's knowledge of plaintiff's ownership and holding of the note is based, leaves no doubt possible as to that fact. The note was due April 5th, 1899. On March 27th, 1899, in response to a request of the defendant's firm for an extension of their note, its payee, the advertising company, informed them that it was held by

the plaintiff, whose president refused to give any extension. Thereupon, and on April 4th, the firm wrote to plaintiff that if it would hold their note "due at your bank to-morrow * * * until
46 the 12th instant, we will endeavor to pay the same." Their petition in bankruptcy was filed April 13th, and in their schedule of creditors they inserted, under the heading of "Names of creditors and last holders known to debtors," the payee named in the note and not the plaintiff. In the following September, they obtained the decree discharging them from their debts. In the following November, the plaintiff's president wrote to the president of a bank in Penn Yan, N. Y., making inquiry about the firm of Russell & Birkett and "what condition their affairs are in." Upon hearing, in reply, that they had "been through bankruptcy," plaintiff's president asked, "in which district Russell & Birkett passed through bankruptcy, as we were not aware and never received notification that any such proceedings had taken place." He then learned that the proceedings were in the northern district of New York. However singular those facts, we are not further concerned with them; as we are not assuming, in this action, that the defendant was guilty of fraud in procuring his discharge in bankruptcy. The contention of the defendant is that, notwithstanding the facts, his discharge is a perfect defense to this action, and that involves a construction of the present Federal bankruptcy act, which was passed in 1898. Section 17 of that act provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice, or actual knowledge of the proceedings in bankruptcy," etc. The argument is made that, although the plaintiff had no notice, or actual knowledge, of the bankruptcy proceedings prior to the discharge, by subdivision N of section 57, claims may be proven within a year after the adjudication in bankruptcy, and when, in November, 1899, following the defendant's discharge, the plaintiff learned of that fact, that it had still five months left to make proof of its claim. Then reference is made to section 15 of the act, whose provisions allow a discharge to be revoked, upon the application of parties in interest, filed within a year from the discharge, for fraud of the bankrupt, etc., and, from these provisions of the Federal statute, it is inferred, and it is insisted, that no substantial rights of the plaintiff have been affected and that, within the intent of the act, it was bound by the decree in bankruptcy and its claim is barred.

While there may be some difficulty in the way of the statutory construction, I think the plaintiff's claim has never been discharged, as the result of the bankruptcy proceedings. In my opinion, there are features in the present bankruptcy act, which differentiate it from preceding acts and which indicate a legislative intent that greater strictness shall prevail in notifying the creditor of the various proceedings in bankruptcy. It is provided that the voluntary bankrupt must file "a list of his creditors, showing their residences, if

known," and that notices must be sent to the creditors at
47 "their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed * * * by the creditors." (Sec. 58*a* and sec. 7, subd. 8.) While in the previous acts of 1841 and of 1867, substituted service of notices by publication was provided for, in the present act, it is actual notice that is required to be given. The schedule of debts, which the bankrupt is to file with his petition, furnishes the basis for the notices which the referee, or the court, is to give thereafter to the creditors, and, thus, the bankrupt appears to be made responsible for the correctness of the list of his creditors. That he is to suffer, in the case of his failure to state the name of the creditor, to whom his debt is due, if known to him, seems to me very clear from the reading of section 17 of the act. That *excepts* from the release of the discharge all debts which "have not been duly scheduled in time for proof and allowance, with the name of the creditor." That is very emphatic language, and how is it possible to obviate its effect by the argument that the plaintiff still had time left, after the discharge was granted, to prove his claim? The excepting clause of the act excludes from the bankrupt's discharge debts, which "*have not been* duly scheduled in time for proof," etc. Can we say that such debts as *may* be proved within a year from the adjudication in bankruptcy are discharged? I think, clearly, not The present act, differing in such respects from the preceding acts, requires strict notification of the various steps in the bankruptcy proceedings to be given to the creditors of the voluntary bankrupt, according to his schedule, and it excepts from the release of the bankrupt's discharge provable debts, which had not been duly scheduled, etc. I think it was intended that the decree discharging the voluntary bankrupt should be confined in its operations to the creditors, who had been duly listed and who were enabled to receive the notices which the act provides for.

Nor can I agree with the suggestion that is made that plaintiff's substantial rights were not affected. Whether that is a necessary factor in the case, I do not say; but they certainly were, in my opinion. The plaintiff enjoyed none of the opportunities provided by the act for the creditors of a debtor who is seeking a discharge from his debts; such as the selection of a trustee, or the examination of the bankrupt, as preliminary to opposition to the discharge. Those were rights accorded by the act, and I am quite unable to perceive how it can be held that the plaintiff could be deprived of them and remitted for all remedy to an attack upon the decree of discharge.

For these reasons, I advise the affirmance of the judgment, with costs.

VANN, *J.* (dissenting):

The trial court found that, upon his own petition, the defendant was adjudged a bankrupt on the 15th of April, 1899, and was discharged in bankruptcy on the 12th of September following; that

the claim of the plaintiff was not duly scheduled in its name in time for proof and allowance, and that it had no notice or knowledge of the proceedings in bankruptcy prior to such discharge.

48 The court did not find that the plaintiff did not know of the proceedings in bankruptcy in time to prove its claim and have it allowed, but simply that it had no knowledge until after the discharge was granted. The uncontradicted evidence, consisting of the plaintiff's letters, showed that it knew that the defendant was in bankruptcy, and as early as the 18th of November, 1899, had specific information as to the name and address of the referee in charge. The plaintiff, then, had five months within which to prove its claim.

The debt in question was for goods sold to the bankrupt and his copartner and the evidence thereof was a note given by them to the vendor therefor, which became due on the fifth of April, 1899. It was duly scheduled in the name of the vendor, but not in the name of the plaintiff bank, to which it had been transferred, as the defendant knew.

The national bankruptcy act, approved July 1st, 1898, provides that "any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending." The judge upon hearing the application "and such proofs and pleas as may be made in opposition thereto by the parties in interest," must discharge the applicant, unless he has violated certain specified provisions of the act. (§ 14.)

The judge may revoke the discharge "upon the application of parties in interest who have not been guilty of laches, filed at any time within one year after a discharge shall have been granted," provided it was obtained through fraud, that knowledge thereof "came to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge." (§ 15.)

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, *unless such creditor had notice or actual knowledge of the proceedings in bankruptcy;* or (4) were created by his fraud, embezzlement, misappropriation or defalcation, while acting as an officer or in any fiduciary capacity." (§ 17.)

A certified copy of an order granting a discharge "shall be evidence of the jurisdiction of the court, the regularity of the proceedings and of the fact that the order was made." (§ 21, par. f.)

Claims may be proved and allowed against a bankrupt's estate at any time within one year after the adjudication. (§ 57.)

Creditors are entitled to "at least ten days' notice by mail
49 to their respective addresses as they appear in the list of creditors of the baukrupt," of all examinations of the bankrupt, hearings upon application for discharge and all meetings of creditors, declarations of dividends, etc. (§ 58.)

The amendments made by the act of February 5, 1903, are not alluded to, as they are not material in this controversy. General order number eleven, made by the Supreme Court of the United States as authorized by the act, provides that the schedules may be amended, but it does not specify the time within which the amendment may be allowed.

A discharge in bankruptcy is presumptive evidence that every provable debt contracted prior to the date when the petition was filed is discharged thereby. A debt created by the purchase of goods on credit, whether merged in a promissory note given therefor or not, is provable under the act. (§§ 17 and 57.) In order to defeat the discharge, not only duly pleaded and proved by the defendant but found by the court, the burden of proof was upon the plaintiff to establish by sufficient evidence and an appropriate finding that its claim was one of those excepted from the effect of a discharge. This was the rule under prior bankruptcy acts, which excepted certain debts from the operation of a discharge, and there is no reason why it should not be applied to the one now in force. (Sherwood *v.* Mitchell, 4 Denio, 435; Brereton *v.* Hull, 1 Denio, 75; McCabe *v.* Cooney, 2 Sand. Ch. 347, 352; Harrison *v.* Lourie, 49 How. Pr. 124, 128; Stevens *v.* King, 16 App. Div. 377; Chapman *v.* Forsyth, 2 How. [U. S.] 202, 208; Cutter *v.* Folsom, 17 N. H. 139, 149; Johnson *v.* Ball, 15 N. H. 407; Brown *v.* Broach, 52 Miss. 536, 541; Bump on Bankruptcy [11th ed.], 725; Collier on Bankruptcy [3rd ed.], 202; Potter's Dwarris on Statutes, 118; Sedgwick's Stat. Con. 50.)

In Sherwood *v.* Mitchell, Judge Jewett, speaking for the court said: "When a cause of action or matter of defense under a statute is pleaded, which statute contains a proviso or exception in the same substantive clause on which the action or defense is founded, although the declaration or plea must deny that the cause of action or defense is within the proviso or exception, yet it is not necessary for the party to prove the negative; but it rests with the other party to prove the affirmative. * * * The discharge is presumptive evidence of all the facts asserted in it, and is conclusive until overthrown by evidence of some fact which by the act avoids it. Debts arising out of a violation of an official or private trust are not affected by it, unless the creditor chooses to prove the demand under the bankruptcy. The discharge, it is true, is general in its terms, and *prima facie* is a discharge of the bankrupt from all his debts. But the creditor may, notwithstanding, show that his debt is of the excepted class. The *onus*, however, is on him, and if he fails to make the proof, the debt will be taken to be one of an ordinary character."

In McCabe *v.* Cooney, Vice Chancellor Sanford said: "Nor do I

think it necessary for the answer to allege that the complain-
50 ant's debt was not within the excepted debts which are excluded from the operation of the law. That fact, like any other matter, intended to avoid the effect of the discharge, must be shown by the complainant. In support of the answer the certificate of the defendant's discharge is sufficient evidence for him until it is impeached or avoided."

In Chapman *v.* Forsyth the court said: "From these considerations, we are led to say in answer to the third question, that, unless a fiduciary creditor shall come into the bankrupt court, prove his debt, etc., he is not bound by the discharge, but may sue for and recover his debt from the discharged bankrupt, by showing that it was within one of the exceptions of the first section."

While the cases are not uniform upon the subject, according to the decided weight of authority it is not necessary for the defendant to prove a negative by showing that the debt is not one of those excepted by the act, but it is necessary for the plaintiff to show as an affirmative fact in answer to the plea of a discharge in bankruptcy that the debt sued upon falls within the exceptions. Any other rule would be clumsy and inconvenient, for it would require the defendant to prove the negative of at least a dozen propositions. The plaintiff in this action failed to meet the burden of proof which the law casts upon it. There was neither a finding, nor evidence to warrant a finding that the debt was one of those excepted by section seventeen. While it appeared that the debt was not scheduled in the name of the plaintiff, it also appeared that it was scheduled in the name of the payee of the note and the vendor of the goods for which the note was given, and that notice of the bankruptcy proceedings was given accordingly. Furthermore, it appeared that the plaintiff had actual knowledge of the proceedings in bankruptcy, in time to prove its debt and to apply for a revocation of the discharge.

Thus the discussion is narrowed to the real meaning of paragraph three of section seventeen, which I repeat for convenience; debts are not discharged which "have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." The failure to schedule is not conclusive, for if the creditor had knowledge of the proceedings in bankruptcy it does not affect the discharge. While the statute does not, in terms, provide the date when notice must be given or knowledge acquired in order to take the debt out of the exception, the context shows that it must be "in time for proof and allowance." The words last quoted show the reason upon which the exception is founded and indicate the time when notice or knowledge must come to the creditor in order to do away with the exception. The object of the act is to discharge the debtor from his provable debts, and the object of proving a debt is to enable the creditor to share in the distribution of the estate. If he has time for that, the statute

is satisfied and the debt is discharged, whether he actually
51 proves his debt or not. If the court should hold that any other date is meant, the construction would be arbitrary and without foundation in the language of the statute, which must be the sole guide. One case is cited which is directly in point upon the question under discussion. In Fider v. Manheim (81 N. W. Rep. 2) the action was upon a promissory note and the answer plead a discharge in bankruptcy. Before the defendant was adjudged a bankrupt he knew that the note had been transferred to the plaintiff, but, notwithstanding, he scheduled the note as held by the original payee and no notice was given to the plaintiff in the bankruptcy proceedings. It appeared, however, that the plaintiff had actual knowledge of such proceedings in time to prove his claim and have it allowed, and the court held that the note was barred by the subsequent discharge in bankruptcy.

While in the case before us the plaintiff lost the right to oppose the application for a discharge, it did not lose the right to apply to revoke it, if any ground existed therefor, which is not suggested. Moreover, if the statute means that paragraph three of section seventeen does not apply when the creditor knew of the bankruptcy proceedings in time to prove his claim, the loss of the right to resist the discharge in the first instance does not enable the plaintiff to take advantage of a technical omission to defeat the primary object of a great remedial act, which is to relieve honest debtors from the burden of their debts, so that they can start in business again and add to the wealth of the country.

I think that the findings of fact, even when supported by the usual presumptions in aid of a judgment, do not sustain the conclusions of law and, hence, that the judgment should be reversed and a new trial granted, with costs to abide event.

Parker, Ch. J., O'Brien, Bartlett, Haight and Cullen, JJ., concur with Gray, J.; Vann, J., reads dissenting opinion.

Judgment affirmed.

52 UNITED STATES OF AMERICA, *ss:*

[Seal of U. S. Circuit Court, South. Dist. New York.]

The President of the United States of America to the honorable the justices of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the supreme court of the State of New York to which court the record and judgment of the court of appeals of the State of New York was remitted in accordance with the law and practice of the said State of New York, said record and judgment remaining in said supreme court of the State of New York, the said court of appeals being the highest court of law or equity of the State in which a decision could be had in the said suit between The Columbia Bank, plaintiff, and Clarence T. Birkett, defendant,

wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute or of an authority exercised under the said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question *or* construction of a clause of the said Constitution, or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said Clarence T. Birkett, as by his complaint appears, we being willing that
53 error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of March in the year of our Lord one thousand nine hundred and three.

JOHN A. SHIELDS,
Clerk of the United States Circuit Court,
Southern District of New York.

Allowed by
ALTON B. PARKER,
Chief Judge of the Court of Appeals.

54 [Endorsed:] New York supreme court Columbia Bank *vs.* Clarence T. Birkett Writ of error Thomas Carmody defendant's attorney Office & P. O. address Penn Yan New York Rec'd Apr. 2 1903 Thos. L. Hamilton clerk

55 Supreme Court, State of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

To the Hon. Alton B. Parker, chief judge of the court of appeals of the State of New York:

And now comes Clarence T. Birkett by Thomas Carmody, Esq., his attorney, and complains that in the record and proceedings, and

also in the rendition of a judgment — a plea in the suit betwee
The Columbia Bank, plaintiff, and Clarence T. Birkett, defendant
which is in the court of appeals of the State of New York, bein
the highest court of law and equity of the said State in which a de
cision could be had, and the said court of appeals having rendere
the decision affirming a judgment theretofore rendered in th
supreme court of the State of New York on the 13th day of Novem
ber, 1901, which judgment affirmed the judgment of the trial teru
of the supreme court of the State of New York rendered on the 9t
day of March, 1901, in favor of the said plaintiff and against th
said defendant for the sum of $836.63, together with $124.43
56 costs, amounting in all to the sum of $961.06, and that th
plaintiff have execution therefor against the said defendan
and which said decision of the court of appeals was, according t
the rules and practice of the said court, together with the record o
the said judgment, remitted by the said court of appeals in to th
supreme court of the State of New York before the justices thereo
according to the form of the statute in such case made and provided
to be enforced according to law and which record now remains i
said supreme court before the justices thereof, and which said re
mittitur was entered in the office of the clerk of the supreme cour
of New York county on the 18th day of March, 1902, and judgmen
entered thereon, making the judgment and decision of the court o
appeals the judgment of the supreme court of the State of New York
and wherein was drawn in question the validity of the statute an
of an authority exercised under the United States, and the decisio
is against their validity and wherein a right was claimed under th
Constitution and also under the statute of the United States, and th
decision was against the right specially set up and claimed, all o
which appears in the record and proceedings in said suit, manifes
error has happened to the great damage of the said Clarence T
Birkett.

Wherefore, the said Clarence T. Birkett, by his attorney aforesaid
prays for an allowance of a writ of error and such other process a
may cause the said error to be corrected by the Supreme Court o
the United States.

Dated, March 21st, 1903.

THOMAS CARMODY,
Attorney for Clarence T. Birkett, Defendant.

Office and post-office address, Penn Yan, N. Y.

57 [Endorsed:] New York supreme court Columbia Bank
vs. Clarence T. Birkett Petition for writ of error Thomas
Carmody defendant's attorney Office & P. O. address Penn Yan
New York Rec'd Ap'l 2 1903

58 STATE OF NEW YORK, }
County of New York. }

Clerk's office of the supreme court of the State of New York for the county of New York.

I, Thomas L. Hamilton clerk of the county of New York and of the supreme court of the State of New York, for the said county of New York, by virtue of the annexed writ of error which was served upon me on the 2nd day of April 1903 and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 42 inclusive contain a true and complete transcript of the record and proceedings had in said court in the suit Columbia Bank *vs.* Clarence T. Birkett mentioned in said writ of error as the same remain of record and on file in my office, and that annexed hereto is the petition for said writ of error, the citation to the writ in error with proof of service of the same, the said writ of error served upon me with a copy of the opinion of the court of appeals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at my office in the city and county of New York, on the 13th day of April 1903.

[Seal of New York.]

THOS. L. HAMILTON, *Clerk.*

59 UNITED STATES OF AMERICA, ss:

To the Columbia Bank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to the writ of error in the clerk's office of the New York supreme court in a suit wherein The Columbia Bank is defendant-in-error, and Clarence T. Birkett is plaintiff-in error, to show cause, if any there be, why the judgment rendered against the said Clarence T. Birkett, plaintiff-in-error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Alton B. Parker, chief judge of the court of appeals the 30th day of March, in the year of our Lord, one thousand nine hundred and three.

ALTON B. PARKER,
Chief Judge Court of Appeals.
M. J. D.

60 [Endorsed:] New York supreme court Columbia Bank *vs.* Clarence T. Birkett Citation Thomas Carmody defendant's attorney Office & P. O. address Penn Yan New York Rec'd Apr. 2 1903 Thos. L. Hamilton c'k

61 Supreme Court, State of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BUKETT, Defendant.

STATE OF NEW YORK,
County of New York, } ss:

Thomas Downs, being duly sworn says he is over the age of twenty one years and that he served a copy of the petition, order and writ of error, citation and bond on writ of error on W. S. Griffith the cashier of The Columbia Bank the above named plaintiff on the 31st day of March, 1903 by delivering copies of the above named papers to said cashier in his office in the above named bank at 501 Fifth Ave., borough of Manhattan, city of New York and leaving the same with him. Deponent further says he knew the person so served to be the cashier of the Columbia bank.

THOMAS DOWNS.

Sworn to before me this 31st day of March, 1903.

ANNA T. MALLON,
Notary Public 40, *Kings Co.*

Cert. filed in N. Y. Co.

62 Supreme Court, State of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

In this cause application having been made to Hon. Alton B. Parker, chief judge of the court of appeals of the State of New York, for an allowance of a writ of error to remove such cause to the Supreme Court of the United States for review in accordance with the Constitution and laws of the United States and the rules and practice of the Supreme Court of the United States, and for the fixing and approving of the bond on removal of said cause to the Supreme Court of the United States, it is hereby

Ordered that said writ of error be and the same is hereby allowed, and the same may be issued by any officers authorized to issue the same, and the penalty in the bond is hereby fixed at the sum of $2000.00, with Laura R. Birkett and Clarence H. Ferenbaugh as sureties thereon.

ALTON B. PARKER,
Chief Judge, Court of Appeals.

Dated, March 25th, 1903.

63 [Endorsed:] New York supreme court Columbia Bank *vs.* Clarence T. Birkett Order for writ of error Thomas Carmody defendant's attorney Office & P. O. address Penn Yan New York

64 Know all men by these presents: That we, Clarence T. Birkett of the village of Penn Yan, Yates county, and State of New York, as principal, and Laura R. Birkett of the same place, and Clarence H. Farenbaugh residing at Dresden, in the county of Yates and State of New York, by occupation a miller, as sureties, are held and firmly bound unto Columbia Bank of the City of New York, in the full and just sum of two thousand dollars ($2000) to be paid to the said Columbia Bank, its attorney, successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors or assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of March, 1903.

Whereas, on or about the 6th day of March, 1903, at a session of the court of appeals of the State of New York, in a suit pending in said court between Columbia Bank, plaintiff and respondent, and the said Clarence T. Birkett, defendant and appellant, a decision was rendered against the said defendant affirming a judgment of the supreme court of the State of New York; and the said defendant Clarence T. Birkett having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the decision in the aforesaid suit; and a citation directed to the said Columbia Bank citing and admonishing it to be and appear at a term of the Supreme Court of the United States at Washington, D. C., within thirty days from the date thereof;

65 Now, the condition of the above obligation is such, that if the said Clarence T. Birkett shall prosecute his said writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CLARENCE T. BIRKETT. [L. S.]
LAURA R. BIRKETT. [L. S.]
CLARENCE H. FERENBAUGH. [L. S.]

STATE OF NEW YORK, } ss:
County of Yates, }

On this 23rd day of March, 1903, before me, the subscriber, personally appeared Clarence T. Birkett, Laura R. Birkett and Clarence H. Ferenbaugh, to me personally known to be the same persons described in and who executed the foregoing instrument, and they severally duly acknowledged to me that they executed the same.

JOHN T. KNOX,
Yates County Judge.

STATE OF NEW YORK, } ss.:
County of Yates, }

Laura R. Birkett, being duly sworn, says that she is a resident of the State of New York and a free holder therein; that she is worth the sum of four thousand dollars over and above all the debts which she owes or has incurred, exclusive of property exempt by law from levy and sale under an execution.

LAURA R. BIRKETT.

Sworn to before me this 23rd day of March, 1903.

JOHN T. KNOX,
Yates County Judge.

66 STATE OF NEW YORK, } ss.:
County of Yates, }

Clarence H. Ferenbaugh, being duly sworn, says that he is a resident of the State of New York and a free holder therein; that he is worth the sum of four thousand dollars over and above all the debts which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution.

CLARENCE H. FERENBAUGH.

Sworn to before me this 23rd day of March, 1903.

JOHN T. KNOX,
Yates County Judge.

Form 9.

No. 33.

STATE OF NEW YORK, } ss.:
County of New York, }

I, Thomas L. Hamilton, clerk of the said county and clerk of the supreme court of said State for said county, do certify, that I have compared the preceding with the original bond on writ of error on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed filed Ap'l 22d 1903.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 22d day of Ap'l 1903.

[Seal of New York.]

THOS. L. HAMILTON, *Clerk.*

67 [Endorsed:] Copy New York supreme court Columbia Bank *vs.* Clarence T. Birkett Bond on writ of error Thomas Carmody defendant's att'y Office and post-office address, Penn Yan, N. Y.

Endorsed on cover: File No. 18907. New York supreme court. Term No. 267. Clarence T. Birkett, plaintiff in error, *vs.* The Columbia Bank. Filed April 27, 1903. File No. 18907.

Supreme Court of the United States.

No. ~~267~~ 26, October Term, 1903.

Clarence T. Birkett, plaintiff-in-error,
against
The Columbia Bank, defendant-in-error,

On motion of Mr. Frederic D. McKenney, in behalf of counsel for the plaintiff-in-error,

It is now here ordered by the court that cause be shown by The Columbia Bank before this court, at the city of Washington, on Tuesday, February 23, 1904, at 12 o'clock, noon, of that day, or as soon thereafter as counsel can be heard, why an order should not be made restraining said The Columbia Bank from further enforcement of the judgment entered in this cause by the Supreme Court of the State of New York.

It is further ordered that pending the determination of this order to show cause the said The Columbia Bank and the sheriff of the county of Yates, in the State of New York, are and each is hereby restrained and stayed from any enforcement of the said judgment.

February 1, 1904.

A true copy.

Attest: JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Seal of the Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES.

CLARENCE T. BIRKETT, plaintiff-in-error, against THE COLUMBIA BANK, defendant-in-error,	*No 267.*

United States of America, State of New York, County of Albany, ss.:

Robert G. Scherer, being duly sworn, deposes and says that he is an attorney-at-law residing in the city of Albany, N. Y., and admitted to practice in the United States Supreme Court. That he is also one of the attorneys of record for Clarence T. Birkett, the plaintiff-in-error in the above-entitled action.

That the above-entitled action is brought into this court for review by a writ of error to the supreme court of the state of New York. That the above appeal is an appeal from the judgment of the supreme court of the state of New York in favor of The Columbia Bank and against Clarence T. Birkett, which judgment of the supreme court was affirmed by the court of appeals by an order made on the 7th day of March, 1903, affirming the judgments of the court below and remitting the case to the supreme court for further action; that the remittitur was filed in the office of the clerk of the county of New York and a judgment was entered thereon on the 18th day of March, 1903, making the judgment of the court of appeals the judgment of the supreme court. That thereupon and on the 21st day of March, 1903, the plaintiff-in-error filed his petition, praying that a writ of error be allowed to the United States Supreme Court, and on the 30th day of March, 1903, Hon. Alton B. Parker, chief judge of the court of appeals, made an order directing that a writ of error be allowed to the United States Supreme Court, and further directed that a bond be given in the sum of two thousand dollars ($2,000), being for more than twice the amount of the judgment and costs, with Laura R. Birkett and Clarence H. Farenbaugh as sureties thereon, and on the 30th day of March,

1903, the said chief judge of the court of appeals issued a citation to The Columbia Bank requiring them to show cause why the judgment should not be corrected and why speedy justice should not be done to the parties in that behalf. That on the 25th day of March, 1903, the plaintiff-in-error executed a bond with Laura R. Birkett and Clarence H. Farenbaugh as sureties, to the Columbia Bank of the city of New York in the penal sum of two thousand dollars ($2,000), and that the said bond was duly signed, sealed and executed by the said principal and sureties and duly acknowledged, and to the same was appended the affidavits of the said Laura R. Birkett and Clarence H. Farenbaugh, qualifying in the sum of four thousand dollars ($4,000). That the amount of the judgment entered in the supreme court of the state of New York in favor of The Columbia Bank against Clarence T. Birkett, was the sum of $961.06. That the said writ of error, citation and original bond were duly filed in the office of the clerk of the supreme court of the county of New York in the office wherein the judgment sought to be reviewed is entered and wherein the record on appeal is entered. That a copy of the said petition of said Clarence T. Birkett, the order allowing the writ and fixing the amount of the bond with the sureties, the writ of error, the citation and bond were duly personally served on The Columbia Bank on the 31st day of March, 1903; that the clerk of the supreme court of the state of New York, in pursuance of the said writ of error has made a return to the clerk of the United States Supreme Court of the record in the above-entitled action, and the same is now on file in this court and is No. 267 of the October term. That notwithstanding the above proceedings, the said Columbia Bank on the 26th day of December, 1903, issued an execution to the sheriff of the county of Yates wherein the plaintiff-in-error resides and has his place of business, and on the 28th day of December, 1903, the sheriff of the county of Yates levied the said execution upon the property of the plaintiff-in-error.

That as your deponent is informed and believes the issuance of the bond with the approval thereof by the chief judge of the court of appeals, the filing of the same in the office of the clerk of the

supreme court of the county of New York and service thereof, and of copies of all the papers personally of the defendant-in-error, The Columbia Bank, constitute a *supersedeas* and stay of proceedings upon the said judgment and *supersedeas*. That the said execution is issued without authority of law and in violation of the said *supersedeas* to the great injury of the plaintiff-in-error.

Wherefore, the plaintiff-in-error prays that an order be made staying the execution of the said judgment in all things, and that The Columbia Bank be required to show cause at a term of this court to be held at the Capitol in the city of Washington, D. C., on the day of February, 1904, why all proceedings on said judgment should not be stayed pending the determination of the above-entitled appeal by the Supreme Court of the United States, or for such other and further relief, writ of *supersedeas* or stay as may be just and proper in the premises.

ROBERT G. SCHERER.

Sworn to before me this 30th
day of January, 1904.

ANNA E. BURKE,
Com. of Deeds, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES.

CLARENCE T. BIRKETT, plaintiff-in-error,
against
THE COLUMBIA BANK, defendant-in-error,

State of New York, County of Yates, ss.:

Thomas Carmody being duly sworn, says he is an attorney and counselor-at-law, and resides in the village of Penn Yan in said county and State; that on the 13th day of February, 1904, he served a copy of an order in the above-entitled action bearing date the 1st day of February, 1904, a copy of which is hereto

annexed, upon the sheriff of the county of Yates, by delivering to and leaving with him personally a true copy thereof, at his office, in said village of Penn Yan.

THOMAS CARMODY.

Sworn to before me, this 13th day
of February, 1904.

KATHLEEN L. CAVISTON,
Notary Public.

SUPREME COURT OF THE UNITED STATES.

CLARENCE T. BIRKETT, plaintiff-in-error,
against
THE COLUMBIA BANK, defendant-in-error,

State of New York, City and County of New York, ss.:

Wm. Thos. Rushford being duly sworn, says that he is over 21 years of age; that deponent personally served the annexed order to show cause in the above-entitled action on the following-named defendant therein mentioned, at the time and place herein specified, as follows: On The Columbia Bank, at 501 Fifth avenue, New York city, N. Y., on the 5th day of February, 1904, by delivering to and leaving with Walter S. Griffith, cashier of said defendant, personally, a true copy of said order to show cause, and deponent further says that he knew the person so served to be the cashier of said corporation mentioned and described in the said order to show cause, as defendant therein.

WM. THOS. RUSHFORD.

Sworn to before me, this 6th day
of February, 1904.

HOWARD CAMPBELL,
Notary Public, Kings Co.,
Certificate filed in New York Co.

SUPREME COURT OF THE UNITED STATES.

CLARENCE T. BIRKETT, plaintiff-in-error,
against
THE COLUMBIA BANK, defendant-in-error,

Affidavit of Service.

State of New York, County of New York, ss.:

Wm. Thos. Rushford, of the city of New York, being duly sworn, says that he is 21 years of age and upwards, and that on the 5th day of February, in the year one thousand nine hundred and four, he personally served a copy of the annexed order to show cause on Isaac S. Isaacs, at 52 William street, New York city, by delivering to and leaving with said Isaac S. Isaacs, personally, a true copy thereof.

WM. THOS. RUSHFORD.

Sworn to before me, this 6th day
of February, 1904.

HOWARD CAMPBELL,
Notary Public, Kings Co.,
Certificate filed in New York Co.

Office Supreme Court
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JAMES H. McKENNEY,
C

Supreme Court of the United States.

CLARENCE T. BIRKETT, plaintiff-in-error,
against
THE COLUMBIA BANK, defendant-in-error.

No. 26.

This is an application for an order restraining the defendant-in-error from enforcing the judgment appealed from.

The appeal is from a judgment of the court of appeals of the state of New York affirming a judgment of the supreme court of the state of New York, and the question presented for determination involves the construction of the bankruptcy law.

The plaintiff-in-error sued out his writ of error and gave a bond for a *supersedeas* and believed that the enforcement of the judgment was thereby effectually stayed until the determination of the appeal, but recently the defendant-in-error issued execution to the sheriff of Yates county, wherein the plaintiff-in-error now resides, to levy on the property of the plaintiff-in-error. The sheriff has made a levy on the property and is about to sell the same.

An application was made to this court on the 1st day of February, 1904, and an order was granted on that day staying the enforcement of the judgment appealed from and requiring the defendant-in-error to show cause on the 23d day of February, 1904, why it should not be restrained and stayed from enforcing the judgment pending the determination of this appeal.

The chronological order of the proceedings in this appeal are as follows:

1903, March 7th — Decision of the court of appeals rendered. (Transcript, page 1.)

1903, March 8th — Order entered in the supreme court making the order of the court of appeals the order of the supreme court. (Transcript, page 22 [40].)

1903, March 18th — Judgment entered in the county clerk's office of New York county upon the remittitur of the court of appeals. (Transcript, page 23.)

1903, March 21st — Petition for writ of error prepared. (Transcript, pages 31 and 32.)

1903, March 23d — *Supersedeas* bond in the sum of $2,000 executed by plaintiff-in-error, with two sureties justifying in the sum of $4,000 each. (Transcript, pages 35 and 36.)

1903, March 30th — Order made by chief justice of the court of appeals of the state of New York allowing the writ of error, fixing the amount of the bond and approving the same. (Transcript, page 34.)

1903, March 30th — Citation signed by chief judge of the court of appeals. (Transcript, page 33.)

1903, March 30th — Writ of error allowed by chief judge of the court of appeals and signed by him and (March 31) by the clerk of the United States circuit court, southern district of New York. (Transcript, page 31.)

1903, March 31st — Copy of petition, order for writ, writ of error, citation and bond were personally served on defendant-in-error. (Transcript, page 34.)

From this it is evident that the writ of error was allowed by Chief Judge Parker of the court of appeals March 30, 1903, just twelve days after the judgment appealed from was signed and entered in the office of the clerk of the supreme court of the county of New York, and that that order fixed the amount of the bond, named the sureties, and approved the same. The affidavit of service of these papers shows that on March 31, 1903, after the judgment appealed from was entered in the office of the clerk of the county of New York, that all of these papers including the bond were personally served on the defendant-in-error.

The defendant-in-error had not issued any execution up to that time and did not issue execution until the 26th day of November, 1903.

It is, therefore, submitted, and for the following reasons, that the plaintiff-in-error prosecuted his appeal with all due diligence, and that the enforcement of the judgment appealed from should be stayed, pending the hearing and determination of this appeal.

POINT I.

The practice on appeals in the courts of the state of New York is as follows: Where an action is tried in the supreme court at trial term, an appeal from a judgment may then be taken to the appellate division of the supreme court of the state of New York. From that court an appeal lies to the court of appeals of the state of New York. When the appeal is taken from the appellate division of the supreme court to the court of appeals, the clerk of the supreme court sends the record to the court of appeals of the state of New York, and after that court has made its decision it issues under the hand of its clerk and the seal of the court what is known as a remittitur, remitting the case, together with the record on appeal to the supreme court. The record and the remittitur are then filed in the office of the clerk of the supreme court of the county wherein the action was originally tried; an order is made at special term of the supreme court making the order of the court of appeals the order of the supreme court. The judgment is then entered on that order, making the judgment of the court of appeals the judgment of the supreme court, and then, and not until then, is the judgment creditor entitled to enforce his judgment by the issuance of an execution. The record remains for all time in the office of the clerk of the supreme court. Hence, the writ of error in this case properly ran to the supreme court of the state of New York (Gelston v. Hoyt, 3 Wheat., 247; McGuire v. Commonwealth, 3 Wall., 387; Atherton v. Fowler, 91 U. S., 143), and the writ of error was properly

allowed by the chief judge of the court of appeals, that being the highest court of the state of New York.

United States Revised Statutes.

§ 1003. Writs of error from the supreme court to a state court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

§ 1000. Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff-in-error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid.

§ 1007. In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, executions shall not issue until the expiration of (the said term of sixty) (ten) days.

Rules of the United States Supreme Court, No. 29.—Supersedeas.

Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff-in-error or appel-

lant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

"A *supersedeas* is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of congress in that behalf. We are not required, therefore, to issue any writ to perfect the rigt of a party to that which the law has given him; but if the court below is proceeding, through a mistake or otherwise, to execute its judgment or decree notwithstanding the *supersedeas*, we may, under section 716 of the Revised Statutes, issue an appropriate writ to restrain that action, for it would be 'a writ necessary for the exercise of our jurisdiction.' The precise form of the writ to be issued, or relief to be granted, must necessarily depend upon the particular circumstances of any case that may arise."

Goodard v. Ordway (94 U. S., 672).

In that case the motion was for the writ of *supersedas*.

In Telegraph Company v. Eyser (19 Wall., 419) the judgment was affirmed by the supreme court of the territory of Colorado on September 6, 1873. On the eighth of October following the defendant sued out a writ of error returnable to the United States supreme court; it was duly served and returned. On the

last-mentioned day a citation was served on the adverse party and a *supersedeas* bond in the sum of $12,000 conditioned and approved according to law was filed in the proper office there. The plaintiffs-in-error, in their petition, represented that the defendant-in-error applied to the supreme court of the territory for an order that execution issue on the judgment, notwithstanding the writ of error and the *supersedeas* bond, and that they were apprehensive that such an order would be made.

In that case it was held that where the writ of error was sued out and the bond served within sixty days after the rendition of the judgment appealed from, it constituted a *supersedeas*. "It is expressly declared that the *supersedeas* bond may be executed within sixty days after the rendition of the judgment, and later, with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance must, of course, precede the execution of the bond; and, as the judge who signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before or simultaneous with the filing of the bond. Indeed the giving of the bond alone is made the condition of the stay."

In Covington Stock Yards v. Keith (121 U. S., 248) it was held that "As the appeal was taken within sixty days after the rendition of the decree, Mr. Justice Matthews, the justice of this court, assigned to the sixth circuit, has power, under section 1007 of the Revised Statutes, to grant, in his discretion, a further stay of execution, if application to him for that purpose is made."

In this case the judgment complained of was entered in the office of the clerk of the county of New York on the 18th day of March 1903. (Transcript, page 23.) The petition for a writ of error was signed March 21, 1903 (Transcript, pages 31-32), and a bond was executed on the 23d day of March, 1903, in the sum of $2,000 in the form required by law, the sureties qualifying in the sum of $4,000 each. (Transcript, pages 35-36.) An order was made on the 30th of March, 1903 (Transcript, page 34) by the chief judge of the court of appeals of the State of New York allowing the writ of error and directing that a

bond be given in the sum of $2,000 with designated sureties. The writ of error was sued out and the writ, citation and bond were personally served on the Columbia Bank on the 31st day of March, 1903. (Transcript, page 34.) No execution had been issued out at that time. The plaintiff-in-error proceeded promptly observing the form prescribed by the United States Revised Statutes. He then sued out his writ of error, obtained a citation, gave the bond directed by the chief judge of the court of appeals. Every formality of the statute has been complied with and copies of all of these papers were personally served on the defendant-in-error and the clerk of the supreme court of the state of New York has made the return to the clerk of this court and the case is now on the calendar, and at this late date an execution has been issued and levied on the judgment complained of. It is submitted that an order should be made staying all proceedings on the part of the defendant-in-error and requiring him to show cause why a writ of *supersedeas* should not issue or such other writ as may stay the judgment complained of. (Kitchen v. Randolph, 93 U. S., 86.) It may be claimed that the bond was not approved by the judge who issued the citation but it will be seen that the bond was executed before the order was made allowing the writ, and that the order directing the allowance on the writ required a bond in the sum of $2,000 with the same sureties who executed the bond. From the transaction alone it would seem that the bond had been approved by Chief Judge Parker. A formal approval in writing is not required.

In Davidson v. Lanier (4 Wallace, at page 454), it was held "The judiciary act does not, in terms, require that the judge shall put his approval of the bond in writing, nor can a writ of error be treated as a nullity because sufficient security is not given." In that case the judge allowing the writ and issuing the citation did not formally approve the bond in writing, nor did it appear that he executed any judgment touching the security. He was an attesting witness to the signatures on the bond and the court said, "It is also urged that the appeal bond was not approved by the judge, but it is a fair inference from the acts of

the judge in signing the citation and in witnessing the appeal bond that he approved of the security." What was actually done in this particular case was the bond was presented to the chief judge and when he made the order allowing the writ, fixing the penalty of the bond and naming the sureties, he did it with the bond before him, and it was the supposition of the attorneys for the plaintiff-in-error that it not only constituted, but was the correct practice for the approval of the bond.

POINT II.

The writ of error was sued out within sixty days after rendition of judgment sought to be reviewed, and all the other proceedings were actually taken within that time. Moreover, copies of the petition for the writ, the writ of error, the order allowing the writ of error and approving the bond, the citation and the bond were personally served on the defendant-in-error (Transcript, page 34 [61]) within thirteen days after the rendition of the judgment and nearly eight months before the execution was issued. The plaintiff-in-error acted promptly and in good faith and he is desirous of having this judgment reviewed and is willing to give any bond the court may see fit to require for the purpose of staying the enforcement of this judgment until the determination of the appeal in this court. It may be said that no assignment of error was returned with the transcript of the record. This, however, does not deprive the court of jurisdiction and is not a ground for dismissal. (Gumbel v. Pitkin, 113 U. S., 545.)

It may be claimed that no copy of the writ of error was left with the clerk, but the writ was actually issued by the clerk for the southern district of New York under his seal and a copy of the writ was personally served on the defendant-in-error within thirteen days after the rendition of the judgment complained of; so the defendant-in-error has suffered no harm in any way. Moreover, the clerk of the supreme court of the State of New York certifies (p. 33 of Transcript) that "annexed hereto is the peti-

tion for said writ of error, the citation to the writ in error with proof of service of the same, the said writ of error served upon me with a copy of the opinion of the court of appeals." (Gumble v. Pitkin, 113 U. S., 545, 546, 547.) It has been amply secured and did not issue its execution until some eight months after the appeal was taken.

It is, therefore, submitted that the judgment of the court below was properly stayed, and such a writ should be made as will prevent any further proceeding on this judgment.

ROBERT G. SCHERER,
J. MURRAY DOWNS,
Attorneys for plaintiff-in-error.

IN THE

Supreme Court of the United States.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

CLARENCE T. BIRKETT, Plaintiff-in-error,
AGAINST
THE COLUMBIA BANK, Defendant-in-error.

No. 267.
October Term, 1903.

This appeal brings up for review a judgment of the supreme court of the state of New York in favor of the defendant-in-error and against the plaintiff-in-error, entered upon the decision of the court of appeals, affirming a judgment entered in the supreme court of the state of New York, in favor of the defendant-in-error and against the plaintiff-in-error for the sum of $836.63, damages, and $124 costs. (Fol. 16.)

FACTS.

This action was brought by The Columbia Bank against Birkett to recover on a promissory note made by Russell & Birkett to the order of the Manhattan Railway Advertising Company for the payment of the sum of $750 April 5th, 1899. (Fols. 8-9.)

The answer admitted the making of the said note, by the firm of Russell & Birkett (Russell having died prior to the commencement of the action), to the order of the Manhattan Railway Advertising Company, its endorsement to The Columbia Bank, and that The Columbia Bank was a bona fide holder for value. (Fol. 10.)

For further defense the said Birkett (the surviving partner) pleaded a discharge in bankruptcy in favor of the said firm of Russell & Birkett, which discharge in bankruptcy was granted on the 12th day of September, 1899. (Fols. 10 and 11.) The action was tried at a trial term of the supreme court, the Hon. John Proctor Clarke presiding, a jury having been waived (fol. 21), and the trial court made findings of fact and conclusions of law (fols. 13 to 15) and directing the entry of a judgment in favor of The Columbia Bank against the defendant for the sum of $836.63, being the amount of the note, with interest, together with the costs. (Fol. 15.) An appeal was then taken to the appellate division of the supreme court of the state of New York, which affirmed the judgment (fols. 35 and 36), and a further appeal was then taken to the court of appeals of the state of New York, which handed down a decision on the 6th day of March, 1903, affirming the judgment of the court below in all things and remitting the case to the supreme court to be enforced according to law. (Fols. 1 to 4.) Thereupon a judgment was entered in the supreme court of the state of New York making the judgment of the court of appeals the judgment of the supreme court. The plaintiff-in-error then sued out a writ of error to the supreme court of the state of New York (fols. 52 and 53), by which this case is brought to this court for review.

Prior to the commencement of the action Calvin Russell, of the firm of Russell & Birkett, died, and the action was brought against Clarence T. Birkett. The note due April 5, 1899, had been given in renewal of a prior note, and on or about the 25th day of March, 1899, Russell & Birkett wrote the Manhattan Railway Advertising Company requesting a further extension of time. The Manhattan Railway Advertising Company replied to that letter (fols. 25 and 26), stating that the note was held by The Columbia Bank and that they could grant no further extension. Thereupon, Russell & Birkett wrote The Columbia Bank requesting an extension from the 5th of April, 1899, to the 12th of April, 1899 (fol. 27), which extension was granted. On or about the

12th day of April, 1899, Russell & Birkett filed a voluntary petition in bankruptcy, praying that they be adjudicated bankrupts (fol. 27), and on the 15th day of April, 1899, at a term of the district court of the United States, northern district of New York, Russell & Birkett, copartners, and Calvin Russell and Clarence T. Birkett, individually, were duly adjudicated bankrupts. (Fol. 29.) Attached to their voluntary petition were the schedules required by law, and in the schedules (page 17 of the transcript) the note was stated, the name of the creditor given as the Manhattan Railway Advertising Company of New York. No notice to attend the first meeting of the creditors was given by the bankrupts to The Columbia Bank (fol. 14), but The Columbia Bank had actual knowledge of the bankruptcy proceedings in time to prove their claim and have it allowed (fols. 24 and 25), they being informed that Russell & Birkett had gone through bankruptcy, and that the proceeding was before Charles A. Hawley, Esq., referee, at Seneca Falls, N. Y. (Fol. 25.) Russell & Birkett as a firm and individually were duly discharged. (Fol. 30.) When the action was brought and tried a jury was waived and the making and endorsement of the note were admitted (fol. 21); the plaintiff-in-error (Birkett) then offered in evidence the adjudication in bankruptcy and the discharge in bankruptcy. (Fol. 22.) The plaintiff-in-error was then examined as a witness and the facts above referred to were brought out (fols. 23 to 28); the findings of fact made by the trial court will be found at folios 13 to 15, together with the conclusions of law. There is no finding of fact that The Columbia Bank did not have actual knowledge of the proceedings in bankruptcy. The findings made by the trial court with reference to that were as follows:

VIII. That thereafter, to wit: On the 13th day of April, 1899, the said firm of Russell & Birkett, the defendants, upon their own petition, were adjudicated bankrupts in the United States district court for the northern district of New York, and that on September 12, 1899, the said defendants were discharged in bankruptcy.

IX. That the claim of the plaintiff upon the said promissory note and the debt of said firm of Russell & Birkett, and the said defendant, upon said promissory note to the plaintiff were not duly scheduled in time for proof and allowance. That the name of the plaintiff which, at the time of the filing of their schedules in bankruptcy, was known to the bankrupts to be the owner and holder thereof and the creditor of said bankrupt by reason thereof, and that such plaintiff had no notice or actual knowledge or other knowledge of the said proceeding in bankruptcy *prior to the discharge of the bankrupts therein.*" (Fol. 14.)

It will be noted that the note fell due on the 12th day of April, 1899. (Fol. 27.) The petition in bankruptcy was filed about the 13th day of April, 1899 (fol. 27); the adjudication in bankruptcy was made on the 15th day of April, 1899 (fol. 29); the discharge in bankruptcy was granted September 12, 1899. (Fol. 30.) The first meeting of the creditors was held May 2, 1899 (fol. 32), and the year in which the plaintiff might have filed its claim for proof and allowance expired April 15, 1900. The Columbia Bank, the defendant-in-error, had actual knowledge of the bankruptcy proceedings on or about the 17th of November, 1899 (see letters—fols. 24 and 25), and the trial court did not find that The Columbia Bank had no knowledge of the proceedings in bankruptcy, but simply found that The Columbia Bank had no actual knowledge of the proceedings in bankruptcy *prior to the discharge.*

Assignment of Errors.

The defendant assigns the following errors in the final decision of the court of appeals filed herein about March 17, 1903:

I. The court erred in holding and deciding that the claim of The Columbia Bank was not discharged by the discharge in bankruptcy.

II. The court erred in deciding that The Columbia Bank did not have actual knowledge of the proceedings in bankruptcy in time to file and prove its claim.

III. The court erred in holding and deciding that the debt of Russell & Birkett and of the defendant was not released by the discharge in bankruptcy.

IV. The court erred in deciding that the defendant was indebted to the plaintiff in the sum of $750.00, with interest from the 15th day of April, 1899, and that the said debt is still due and owing.

V. The court erred in deciding that the discharge granted by the United States district court for the northern district of New York on the 12th day of September, 1899, being the court having jurisdiction of the bankruptcy proceedings against the firm of Russell & Birkett and the defendant individually, did not duly discharge the defendant from all debts, claims and obligations existing against him or Russell & Birkett on the 15th day of April, 1899, the date when such discharge was granted.

VI. The court erred in deciding that the discharge was not evidence of the jurisdiction of the court, the regularity of the proceedings and the fact that such discharge was made.

VII. The court erred in refusing to decide that the burden of proof was with The Columbia Bank to establish that its claim was not discharged by the discharge in bankruptcy, but that it was excepted therefrom, within the meaning of section 17 of the Bankruptcy Law.

VIII. The court erred in its construction of section 17 of the Bankruptcy Law, being laws of Congress, 1898, chapter 541, and particularly erred in its construction of subdivision 3 of said section 17 by holding that said section did not apply to this case, and that the discharge of the debt of Russell & Birkett and the defendant individually did not release and discharge the claim of The Columbia Bank.

IX. The court erred in ruling and deciding that the claim of The Columbia Bank was not within the intent and meaning of the

Bankruptcy Law, and particularly within the intent and meaning of section 17.

THOMAS CARMODY,
Attorney for Defendant.

Office and post-office address,
Penn Yan, N. Y.

POINT I.

No duty is imposed by the Bankruptcy Law upon a bankrupt to give notice to his creditors. The Bankruptcy Law, section 58, providing for a notice to the creditors of the different hearings, meetings, sales and other matters connected with the bankruptcy proceeding, also provides, subd. c., "*All notices shall be given by the referee* unless otherwise ordered by the judge." Hence, Russell & Birkett, or Birkett, the defendant-in-error here, cannot be chargeable with any neglect if notice in writing was not sent to The Columbia Bank. The only duty imposed upon the bankrupt is that found in section 7 of the law, requiring him to "prepare, make oath to, and file in the court, within ten days * * * a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail and the list of his creditors, showing their residences, if known; if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conduct of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition all matters which may affect the administration and settlement of his estate."

Section 21 of the Bankruptcy Law provides (subdiv. f) "that a certified copy of an order discharging a bankrupt shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made." Provision is also made by general order 11 in bankruptcy for an amendment of the petition and schedules.

It is unquestioned, and the court so finds, that the plaintiff-in-error was duly discharged by the United States district court, northern district of New York, the court having jurisdiction of the person and property of the plaintiff-in-error, and that discharge is evidence, not only of the jurisdiction of the court but the regularity of the proceedings. It is evidence that the plaintiff-in-error duly prepared and filed his schedules, appeared for examination at the first meeting of creditors and was examined as to all matters relating to his property, his creditors and the cause of his bankruptcy. It is further evidence of the fact that the plaintiff-in-error had complied with the requirements of the Bankruptcy Law and was discharged because he was entitled to the discharge. (Section 14, subdivision b, and section 29, subd. b (2).) It is evidence that he made a due return in his schedules with reference to all property owned by Russell & Birkett, or himself, and place before the referee and the creditors attending the meeting all information concerning the property of the firm and of himself and the names of his creditors, and there is no question anywhere in the case that he did not do this. The plaintiff-in-error made all the proof required by law when he offered in evidence the discharge, and the burden of proof was then with the defendant-in-error to show that it was not notified or that it did not have actual knowledge of the pendency of the proceedings in time to file its claim, and have the same allowed. They offered no evidence whatever on this point. When the plaintiff-in-error did these things he had complied with the law, and as we have seen the duty of notifying creditors was imposed upon the referee in bankruptcy and not upon the bankrupt. Congress undoubtedly intended in making this provision, to provide for notice to all of the creditors

of the bankrupt. Doubtless congress believed that there might be cases where the bankrupt would either intentionally or by inadvertence fail to notify creditors, and so in order that creditors might have notice the law directed that the bankrupt should make schedules and file them with the clerk of the court, the referee in bankruptcy and the trustee in bankruptcy, and that he should appear at the meeting of the creditors and be examined fully and thoroughly with reference to his affairs. Should it then appear that the creditors have not been notified or that claims have been presented that are not properly allowable, it becomes the duty of the referee to notify those creditors who had not received notice and to so supervise the collection of the bankrupt's assets and the allowances of the claims against the estate as to bring about a proper distribution of the estate among those who are actually the creditors of the bankrupt. Not only that, but the law went even further, and this is additional evidence of the intent of the act by providing for the revocation of a discharge (Section 15.) It makes provision for the allowances of claims (section 65) which are not offered for proof and allowance until after a dividend has been granted and permitting those creditors to come in and share equally with the others; and so all through the act and the general orders in bankruptcy it clearly appears that Congress realized the fact that not only mistakes, but frauds were apt to occur, and it made provision not only for the amendments of schedules and papers in the proceeding (General Order 11), but provision for revoking discharges, setting aside compositions, permitting creditors whose claims were not scheduled to come in at any time within a year after the petition was filed and prove their claims and have them allowed, permitting creditors to attack claims that had been proved and allowed and have them reconsidered and rejected, providing for creditors whose claims were not proved and allowed until after dividends were granted, and permitting them to come in and receive out of the balance of the fund in the trustees' hands an amount equal to that received by the other creditors upon their dividends, and the law also placed, not upon the bankrupt, but

upon the referee in bankruptcy, the duty of giving notice of all proceedings in bankruptcy to the creditors.

As we have seen, the discharge was evidence of the regularity of the proceeding, and the burden of proof was, of course, upon The Columbia Bank to show that it was not within the effect of the discharge. The Bankruptcy Law, moreover, in providing for the discharge of debts, recognizes the fact that names of creditors and claims may, under some circumstances, be omitted from the schedules. Section 17 of the Bankruptcy Law provides as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." Conceding here that the claim of The Columbia Bank was not properly scheduled, nevertheless, The Columbia Bank did have actual knowledge of the proceedings in bankruptcy. At pages 12 and 13 of the Transcript of Record appears two letters, one dated November 6, 1889, and written by the president of The Columbia Bank to the president of the Baldwin Bank of Penn Yan, Penn Yan, N. Y., the home and residence of the plaintiff-in-error, which reads as follows:

"Columbia Bank, Fifth Avenue and 42d St.

New York, *Nov.* 6, 1899.

M. L. Baldwin, Esq., *President Baldwin's Bank of Penn Yan, Penn Yan, N. Y.:*

Dear Sir.— Messrs. Russell & Birkett, of your city, who failed some time ago, are indebted to us in the sum of seven hundred and fifty dollars ($750) for a note we discounted.

We understood some little time ago that they were about to reorganize their business, and form a corporation, and were to give their creditors stock in the newly-organized company for their indebtedness.

Will you kindly inform us if these people have gone on in business, and, if not, what condition their affairs are in.

Thanking you in advance, and holding ourselves in readiness to reciprocate the favor at any time, I remain,

Very truly yours,

JOSEPH FOX, *Pres't.*"

Mr. Baldwin's answer appears at the bottom of said letter and reads as follows:

"They have been through bankruptcy, and now C. T. Birkett, one of the old firm, is carrying on the business same as formerly, doing a big business.

M. L. BALDWIN."

At the top of page 13 will be found the following letter written by the president of The Columbia Bank to the president of the Baldwin Bank:

"COLUMBIA BANK, FIFTH AVENUE AND 42D ST.

NEW YORK, *Nov.* 17, 1899.

M. L. BALDWIN, Esq., *President Baldwin's Bank of Penn Yan, Penn Yan, N. Y.:*

DEAR SIR.— I received your reply to my letter of the 6th instant, for which I thank you, and desire to trouble you again, namely, to ask you in which district Russell & Birkett passed through bankruptcy, as we were not aware, and never received notification, that any such proceedings had taken place.

Thanking you again for the trouble I am putting you to, and always ready to reciprocate the favor, I remain,

Very truly yours,

JOSEPH FOX, *Pres't.*"

Mr. Baldwin answered by stating that Russell & Birkett had passed through bankruptcy in the northern district of New York,

Charles A. Hawley, referee, Seneca Falls, N. Y. The petition in bankruptcy was filed April 13, 1899, and the adjudication in bankruptcy was made April 15, 1899. The Columbia Bank had actual knowledge of the bankruptcy proceedings November 17, 1899, and thereafter had until April 15, 1900, to file its claim with the referee in bankruptcy and have it allowed, or to apply to the bankruptcy court for the northern district of New York for a revocation of the discharge. It did none of these things. Having actual knowledge of the bankruptcy proceeding in time to file and prove its claim it did nothing.

POINT II.

Pleading the discharge in bankruptcy and proving the same established *prima facie* a complete defense to this action. The claim of the defendant-in-error was in existence and a provable debt against the bankrupt's estate, and the defendant-in-error had actual knowledge of the bankruptcy proceeding in time to prove its claim and have it allowed, and the presumption is that it was barred by the discharge. And hence the burden of proof was with The Columbia Bank to show not only that it had no notice of the proceeding in bankruptcy, but that it had no actual knowledge.

Fider v. Manheim, 81 N. W. Rep., 2.

Jones v. Walter, 74 Southwestern Rep. (Ky.), 249.

Zimmerman v. Ketchum, 71 Pacific Rep. (Kas.), 264.

Smith v. Wheeler, 55 App. Div., 170.

Lamb v. Brown, 14 Fed. Cases, 988; 12 N. B. R., 522.

Carey v. Mayor, 79 Fed. Rep., 926.

White v. Howe, 29 Fed. Cases, 1019; 3 MacLean, 291.

Lathrop v. Stewart, 14 Fed. Cases, 1185; 5 MacLean, 167.

POINT III.

The discharge in bankruptcy was properly pleaded. The New York Code of Civil Procedure, section 532, provides as follows: "In pleading a judgment, or other determination, of a court or officer, of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction." The answer herein, at page 4, alleges the adjudication in bankruptcy of Russell & Birkett as copartners and individually, and that they "were duly discharged in said bankruptcy proceeding, pursuant to the provision of the act of Congress above mentioned, and that by such a discharge the said firm of Russell & Birkett and this defendant individually were duly discharged from all debts, claims and obligations excepting against them or either of them on the said 15th day of April, 1899."

In Livingston v. Oaksmith (13 Abb., 183) it was held that an allegation that the discharge of an insolvent debtor was duly granted was a sufficient pleading of jurisdictional facts.

In Schermerhorn v. Talman (14 N. Y., 93, 135) the court held that while schedules in bankruptcy might be affirmatively attacked and shown not to be properly executed, yet in the absence of proof the courts would presume that the law was complied with.

In Harrison v. Lourie (49 How. Pr., 124, 127) the court said: "The bankrupt can rest upon his discharge and its effect upon his debts, and a creditor is concluded by it until he shows that his debt is of a nature not extinguished by it."

In Stevens v. King (16 App. Div., 377), in an action upon a promissory note where the defendant pleaded a discharge in bankruptcy, the court used this language: "The burden was upon the plaintiff to attack the discharge and show some cause why the decree of the court was not effectual." The plaintiff there claimed,

as is here claimed, that he was not affected by the discharge because he was not a party to the bankruptcy proceedings.

In McCormick v. Pickering (4 N. Y., 276-280) the court said: "It was not necessary to aver that a notice was published to creditors; that jurisdiction being shown, all the subsequent proceedings are presumed to have been regular."

In Morse v. Cloyes (11 Barb., 100-104) the court held that where a discharge in bankruptcy is offered in evidence jurisdiction will be presumed until the contrary appears.

In Small v. Graves (7 Barb., 577) the court held: "The bare omission by an insolvent debtor, applying to be discharged under the two-thirds act, to insert the name of a creditor in his schedules of debts, or a misstatement of the amount due any creditor, will not alone vitiate the discharge. The omission or misstatement must be intentional."

In Hall v. Robbins (61 Barb., 33), where the defendant had been discharged under the insolvent laws of Massachusetts, the court held that the omission of an insolvent debtor to set forth a particular debt in his petition will not vitiate the discharge as to that particular debt, unless the omission was willful or fraudulent.

In Rayl v. Lapham (27 Ohio St., 452, 15 B. R., 508) the court said: "The statute directs certain acts to be done, and publication to be made for the purpose of affording a reasonable opportunity or notice to creditors, but the proceedings are so far *in rem* that actual notice to the creditors is not essential to the jurisdiction of the court, nor will the want of it invalidate the discharge which the court is empowered to grant to the bankrupt."

It is true that the above cases are all under former bankruptcy acts, but they recognize and establish a principle which does not antagonize the provisions of the present act. The same presumption as to regularity and jurisdiction will be indulged in under the present act.

In Fider v. Manheim (81 N. W. Rep., 2), decided by the court of appeals in the state of Minnesota, the plaintiff was the holder

and owner of defendant's note, which had been transferred to him by the payee named therein in October, 1898. The fact of the transfer was known to the defendant, as he made a payment upon it while it was held by the plaintiff. A few days after such payment the defendant filed his petition in bankruptcy and was duly adjudged a bankrupt. In his schedules filed in the bankruptcy proceedings, the note was scheduled to the payee. The payee was given notice of the first meeting of creditors, and the plaintiff received no notice whatever of the bankruptcy proceedings. In May, 1899, the defendant was discharged. In November, 1898, the fact of defendant's bankruptcy proceedings became known to plaintiff. The court there held that the claim was discharged; that the plaintiff had ample time to file his claim after he obtained knowledge of the bankruptcy proceedings. The only difference of the facts in that case and those of the case at bar is that the plaintiff received notice before the discharge. This fact, however, received no weight from the court.

It would be an unreasonable burden to impose upon a bankrupt to prove that all of the steps by which jurisdiction is acquired, were observed every time a creditor chose to attack his discharge. As well might it be claimed that in pleading a judgment under our practice it is necessary to allege and prove jurisdictional facts, such as the service of summons, etc. It might well be that a bankrupt is unable to prove compliance with the statutory requisites. Proof of these facts are in the records of the bankruptcy court, and may not be available at all times to the bankrupt, hence the law dispenses with its necessity until the discharge is affirmatively attacked.

The adjudication in bankruptcy and the discharge in bankruptcy are judgments of the district court of the United States and should have the same effect as the judgments of that court entered in other actions and proceedings, and not only that, but the judgment of discharge is by the law evidence of the regularity of the proceeding, and the act also provides "A discharge in bankruptcy shall release the bankrupt from all of his provable

debts." The burden was not with the plaintiff-in-error to show that The Columbia Bank was not within the exceptions stated in section 17. (Jarecki & Co. v. McElwaine, 107 Fed. Rep., 249.) When the plaintiff-in-error proved that Russell & Birkett individually and as copartners had been discharged in bankruptcy and had proved the discharge in bankruptcy the plaintiff-in-error had sustained his defense, and if the claim of The Columbia Bank was not within the effect of that discharge, the duty was imposed upon The Columbia Bank of showing that fact. It offered no evidence whatever to bring itself within any of the exceptions of section 17. It did not offer a particle of proof showing or tending to show that it did not have notice in writing of the first meeting of creditors, or at least actual knowledge thereof. It offered no proof of any description, even though the plaintiff-in-error conclusively established that it did have actual knowledge of the bankruptcy proceedings as early as November 17, 1899, and even after that actual knowledge, it had a period of five months within which it might have offered its claim before the referee, for proof and allowance and had an opportunity to share in the dividends of the estate.

So we have here the case of a creditor having actual knowledge of a proceeding in bankruptcy in time to file his claim for proof and allowance, and to obtain his dividends neglecting to do so, but waiting until more than a year after the adjudication in bankruptcy — waiting until it was barred by the statute of the opportunity of proving its claim, of neglecting to avail itself of any of the provisions of the Bankruptcy Law, and then coming into court and seeking to avoid the effect of the act and the effect of a discharge of the court duly granted, and offering no proof to show either; that it did not have notice or actual knowledge of the bankruptcy proceedings and no proof to show that it came within any of the exceptions provided for in section 17 of the Bankruptcy Law.

POINT IV.

The defendant-in-error cannot escape the force and effect of subdivision 3 of section 17 of the Bankruptcy Law. We must assume that Congress, in enacting that section must have intended something by it. If it was the intent of Congress that the claims of only such creditors as had received notice in writing of the first meeting of the creditors, should be barred by the discharge, it would have so stated. Subdivision 3 then would have read: "have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt." If the law had been so enacted, then The Columbia Bank would not be bound by the discharge, but the law goes further, and says, "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such (3) * * * as have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or *actual knowledge of the proceedings in bankruptcy.*"

The Columbia Bank cannot claim that it is within this exception because it had actual knowledge of the proceedings in bankruptcy, and further the law does not say actual knowledge of the proceedings in bankruptcy prior to the discharge. It simply says, "actual knowledge of the proceedings in bankruptcy," and a creditor who has such actual knowledge is just as much within the intent and meaning of the law as if his claim had been duly scheduled and he had received due notice in writing of the first meeting. There is no reason why the effect of that section should be limited to such creditors as had actual knowledge prior to the discharge in bankruptcy, for the reason that any creditor has a year after the adjudication in which to appear in court and file his claim for proof and allowance. (Section 57 of the Bankruptcy Law, subd. m.) "A discharge in bankruptcy, however, may be applied for after the expiration of one month subsequent to the adjudication." And so in this case the adjudication in bankruptcy was made the 15th of April, 1899. The Columbia Bank had until the 15th of

April, 1900, in which to file its claim for proof and allowance. The Columbia Bank had actual knowledge of the bankruptcy proceedings on the 17th of November, 1899. It did nothing. Russell & Birkett might have applied for their discharge on the 15th of May, 1899, and obtained it during that month, and it certainly cannot be the meaning of the act, especially since it is not so declared in the act, that the date of discharge in bankruptcy limits the effect of section 17, subd. 3.

A bankruptcy proceeding is in the nature of a proceeding *in rem* before a court of record having jurisdiction and entitled to all presumptions as to its legality and binding effect. (Shawhan v. Wherritt, 7 How., 627; In re Watts, 190 U. S., at 32.) This is a proceeding practically to distribute the property of a bankrupt for the benefit of its creditors and the creditors have a direct representative in the proceedings, the trustee in bankruptcy.

Creditors may appear at any time, enter their appearances and join in the petition for voluntary bankruptcy, or file an answer and be heard in opposition to the petition in bankruptcy. (Sec. 59, subd. f.) Creditors may appear and prove their claims at any time within the year. (Sec. 57, subd. n.) Claims which have been allowed may be reconsidered and reallowed or rejected in whole or in part. (Sec. 57, subd. k.) After a dividend has been paid the creditors may still within the year, appear, prove their claims and receive a dividend out of the balance remaining in the hands of the trustees equal to the dividend theretofore paid to the creditors. (Sec. 65, subd. c.) Unclaimed dividends must be held for a year. (Sec. 66.)

Thus, it is evident that the only statute of limitations contained in the act with reference to the appearance of creditors and their right to share in the distribution of the estate, is the period of one year from the date of the adjudication, and the only statute of limitations with reference to obtaining a discharge is one year from the adjudication, as prescribed by section 14.

Thus, it is apparent that the one year limit is the only limitation, and there is no reason why the court should prescribe a shorter

limitation, a fluctuating limitation to subdivision 3 of section 17 of the Bankruptcy Act. There is no reason why this uniform one year limitation which prevails in all other sections of the bankruptcy act should be disregarded in construing subdivision 3 of section 17, and inserting in place of that, since no other provision is made in the act, a limitation which may vary in different cases from one month to one year. The defendant-in-error knew of the existence of the bankruptcy proceeding, the court having jurisdiction, the referee having charge of the case. It slept on its rights until it was too late to avail itself of the provision of the act. It delayed proceedings, having actual knowledge and made no effort whatever to avail itself of the provisions of the Bankruptcy Law. Then by what right of law or equity are they entitled to come into this court and ask the court to adopt a strict construction of the law, a construction that would limit the remedial and beneficial effects of that act.

It is earnestly urged in the court of appeals that this error in the schedule is a mark of fraud. The trial court made no finding of fraud, and hence that matter is not before the court, but counsel urged it in the court of appeals and will undoubtedly urge it here, and in making this charge of fraud the claim is that any bankrupt might omit any of his creditors from his schedule, and, as a result, such creditors would have no notice of the proceeding and could not come into the bankruptcy court and show cause why the bankrupt should not be adjudicated a bankrupt and show cause why a discharge should not be granted. They say that there might be reason for a bankrupt fearing that some one of his creditors might successfully make a charge of fraud or might successfully prove some one of the facts in subdivision b of section 14, that would warrant the court in refusing the discharge. There are several answers to this. In the first place, if the creditor had no notice or no actual knowledge of the proceeding in bankruptcy in time to prove his claim and have it allowed and attack any of the bankruptcy proceedings, his claim would not be barred by the discharge and would be just as good and valid as though the bank-

ruptcy proceeding had never been had. On the contrary, if he did have actual knowledge of the existence of the bankruptcy proceeding, then it became his duty to appear in the bankruptcy proceeding, prove his claims and prove anything that would warrant the bankruptcy court in refusing and extend the benefits of that act to the bankrupt. Even though he had not the written notice prescribed by the law, if he had actual knowledge within a year subsequent to the adjudication he could come into court and prove his claim, he could attack the claim of any other creditor, and compel that creditor to refund any dividend that he had received. He could attack the discharge (section 15), have it revoked if there was any reason for revoking it. He could, in fact, avail himself of every remedy, every objection and every benefit conferred by that act.

There was no fraud in this case and the trial court refused to find any fraud. We should not shut our eyes to the well-known customs that exist in the business world of to-day. A business man takes a note from his customer. If he needs money he goes to his bank and discounts that note, and to all intents and purposes the bank becomes a *bona fide* holder for value, but the bank invariably looks to its customer for payment of the note, and almost invariably discounts on the credit of the payee of the note and not upon the credit of the maker. To the payee discounting the note at the bank the bank looks for payment. So far as this case goes The Columbia Bank still has its remedy against the Manhattan Railway Advertising Company on its note. We also know where a business man has given a note to his creditor, been discounted by creditor and he desires an extension of credit, he applies to his creditor and not to the bank just as Russell & Birkett in this case applied to the Manhattan Railway Advertising Company for an extension. (Transcript, pp. 13-14.) If the creditor agrees to give an extension he will take a new note. If he does not care to grant the extension he will invariably write the same type of a letter which was written by the Manhattan Railway Advertising

Company in this case. The note is held by the bank and the bank refuses to renew it, and it is also well known that it is the custom with banks, where a defense may exist to a note held by them, for the bank to sue in its capacity as *bona fide* holder for value, and thus keep off any defenses that might be made by the maker as against the payee.

This is what was undoubtedly done in this case. The Columbia Bank was a *bona fide* holder of the note and it had actual knowledge of every fact necessary to enable it to prove its claim against Russell & Birkett and share in the dividends of the bankrupt's estate. The claim was properly scheduled against the Manhattan Railway Advertising Company, whose name undoubtedly appeared on the notebook of Russell & Birkett, and this should explain the error, but fearing, perhaps, they might not get as much a dividend as they would like, The Columbia Bank slept on its rights; it waited until the year had expired and then as an independent holder it brings this action against Clarence T. Birkett, and seeks in this way to avoid the effect of the discharge. Even if The Columbia Bank had no remedy against the Manhattan Railway Advertising Company, it was not only its right but its duty to have filed its claim for proof and allowance with the referee in bankruptcy, and where it refused to avail itself of the privileges of the Bankruptcy Law, it ought not be heard when it comes into this court and seeks to avoid the effect of that act and effect of a discharge properly and duly granted under the provisions of that act when it appears beyond any question that it had actual knowledge of the bankruptcy proceeding and ample time to avail itself of the provisions of the Bankruptcy Law. To require actual knowledge on the part of the creditor before the date of discharge would be to inject into the act another limitation prescribed by the law; a limitation that would vary in different cases; a limitation at variance with the one-year provision which seems to prevail in this law.

"It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where

words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But, if in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application." (U. S. Rep., vol. 182, Pirie v. Chicago Title and Trust Company, page 452.)

THOMAS CARMODY,
ROBERT G. SCHERER,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. ~~283~~. 26.

CLARENCE T. BIRKETT,
Plaintiff in Error,

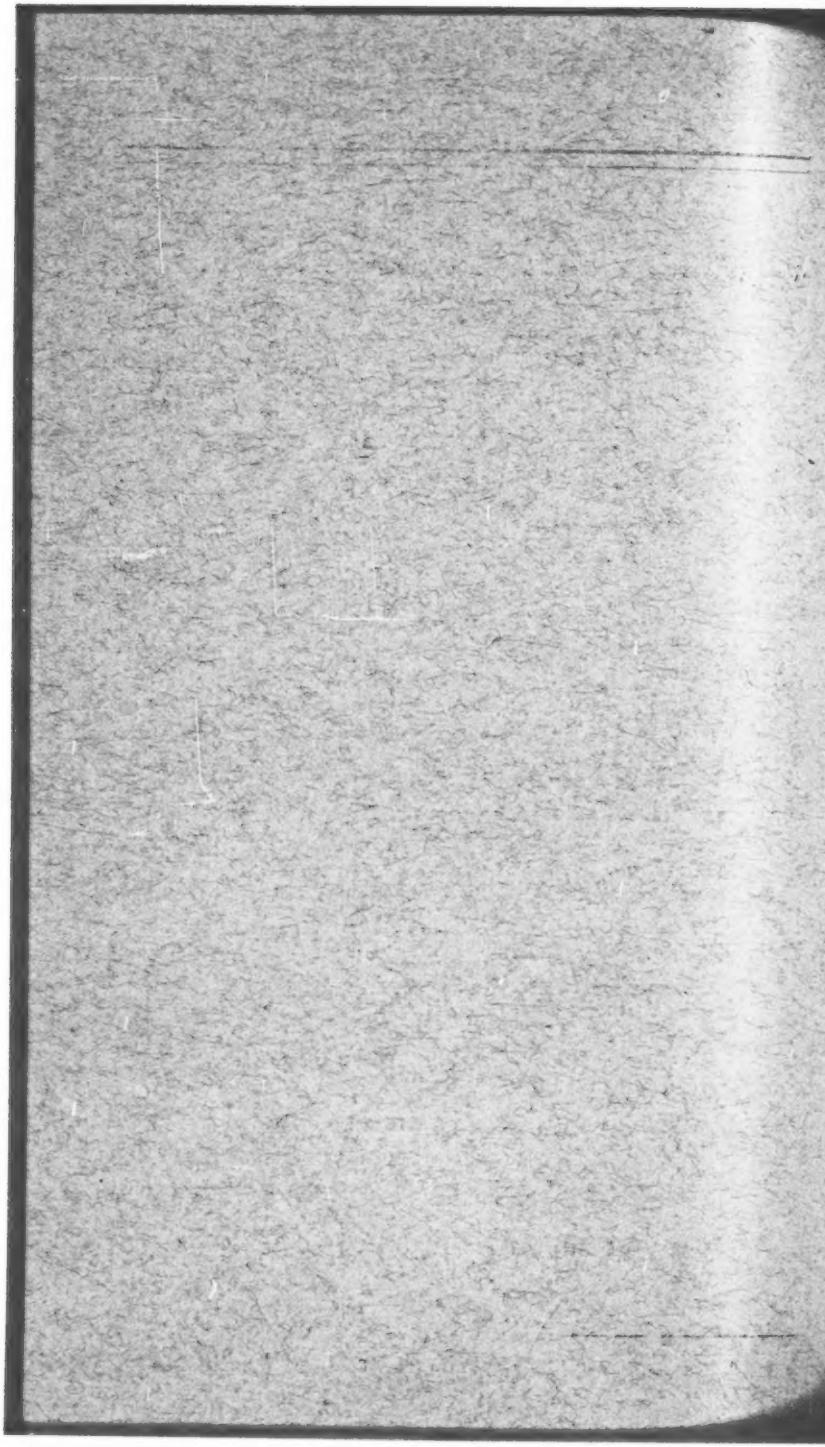
vs.

COLUMBIA BANK,
Defendant in Error.

BRIEF AND AFFIDAVITS IN OPPOSITION TO MOTION FOR SUPERSEDEAS.

JULIUS J. FRANK,
Attorney for Defendant in Error,
52 William Street,
New York.

APPEAL PRINTING CO., 14 Vesey St. TEL. 192 CORTLANDT.



Supreme Court of the United States,

No. 267—October Term, 1903.

CLARENCE T. BIRKETT, Plaintiff in Error,
versus
COLUMBIA BANK, Defendant in Error.

Brief in Opposition to Motion for a Supersedeas.

It appears affirmatively, from the proof submitted in opposition to this motion, that the plaintiff in error failed to lodge with the Clerk of the Court below, in which the record intended to be reviewed remains, a copy of the Writ of Error for the defendant in error within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and that the bond filed by the plaintiff in error was not approved by any judge.

Nor is the contrary alleged in the moving affidavit. There is no allegation of such lodging of a copy of the Writ, and there is no express statement that the bond was approved, although the affiant apparently desires this fact to be inferred from the reference to "the approval thereof by the Chief Judge of the Court of Appeals," which an inspection of the original bond and of the Transcript of the Record fail to disclose.

I.

It is well settled in this court that under such circumstances the plaintiff in error is not entitled to a supersedeas.

U. S. R. S., Section 1000, applies to Writs of Error and requires the Justice or Judge signing the writ to "take good and sufficient security," etc.

U. S. R. S., Section 1007, provides as follows:

> "In any case where a Writ of Error may be a *supersedeas* the defendant may obtain such *supersedeas* by serving the Writ of Error, by lodging a copy thereof for the adverse party in the Clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation."

These provisions, as embodied in the Sections quoted, and in earlier statutes, have frequently been considered by this Court, and *strict compliance* therewith has been uniformly held to be indispensable to the obtaining of the remedy therein provided; and

SUCH COMPLIANCE MUST APPEAR AFFIRMATIVELY FROM THE RECORD.

In *O'Dowd* v. *Russell*, 14 Wall., 402, the Court said, p. 405:

> "It does not appear from the record that any copy of the writ was lodged for the defendants in error in the Clerk's office. It was necessary that such a copy should be filed within sixty days to make the writ of error a *supersedeas*. Nor does it appear when the bond was allowed and filed. It bears date of the 10th of November; the allowance is not dated; nor is its filing noted.
>
> We are of opinion, therefore, that the writ of error cannot operate as a *supersedeas*."

Cited in *Commissioners, &c., v. Gorman*, 19 Wall., 661.

In *United States* v. *Dashiel*, 3 Wall., 688, the Court, per CLIFFORD, J., said, at page 701:

> "Service of a Writ of Error, in the practice of this

PAGE CUT OFF

Court is the lodging of a copy of the same in the Clerk's office where the record remains. Whenever a defendant sues out a Writ of Error and he desires that it may operate as a *supersedeas*, he is required to do two things, and if either is omitted, he fails to accomplish his object; 1—he must serve the writ of error as aforesaid, within ten days, and, 2—he must give bond with securities to the satisfaction of the Court," &c.

In *Kitchen* v. *Randolph*, 93 U. S., 86, in deciding a motion to vacate a *supersedeas*, the Court, per WAITE, C. J., reviewing the history of legislation and the authorities on the subject, holds that under the Revised Statutes there is but one way of serving a writ on the defendant in error, namely, by lodging a copy of the same, within the statutory period, with the Clerk of the lower Court, saying at page 91:

"But time is one of the necessary ingredients in the prescribed service to secure a *supersedeas* under the provisions of the first part of the section. It cannot be dispensed with there any more than it could have been under the Act of 1789, and under that Act, as has been seen, it was essential. In fact, it was the one thing upon which more than all others, the relief sought for depended. Service, 'as aforesaid,' must, therefore, mean such a service as would have perfected the stay, if the proper security had been given. Relief is extended only in respect to the security."

And again at page 92:

"We are, therefore, of the opinion that under the law as it now stands, the service of a writ of error * * * within 60 days, Sundays exclusive, after the rendering of the judgment * * * is an indispensable pre-requisite to a *supersedeas* and that it is not within the power of a justice or judge of the Appellate Court to grant a stay of process on the judgment if this has not been done."

Kitchen v. *Randolph*, *supra*, was followed in *Foster* v. *Kansas*, 112 U. S., 201, where this Court refused to punish for contempt an act done in disregard of a *supersedeas*, which had been granted by a Justice of this Court, such act having been committed during the interval ensuing between the granting of the writ and the filing of the same in the office of the Clerk of the Court below.

In *Railroad* v. *Harris*, 7 Wall., 574, the Court held (page 575) that the effect of the Writ of Error as a *supersedeas* "depends on compliance with the conditions imposed by the Act. * * * *We cannot dispense with that compliance in respect to lodging a copy for the adverse party.*" (Italics ours.)

It seems clear from the authorities that even the personal service of the Writ will not suffice as a substitute for this sole and exclusive method of making service prescribed by the Statute, or as compliance therewith.

See also *Moore* v. *Dunlop*, Fed. Cas. 9759, *Ex Parte Ben* *ibid*, 1285.

II.

Nor has this court power to relieve the plaintiff in error from the effects of his failure to comply with the statute after expiration of the prescribed time.

In *Sage* v. *Railroad Co.*, 93 U. S., 412, the Court on granting a motion to vacate a *supersedeas*, said, *per* WAITE C. J., at page 417:

> "A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with (citing authorities). This is an essential element in the proceeding and one which neither the Court nor the Judges can disregard. If a delay beyond the limited time occurs the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired and of which he cannot be deprived without due process of law. * * * To make a *nunc pro tunc* order effectual for such purposes it must appear that the delay was the act of the Court and not of the parties, and that injustice will not be done."

See also *Kitchen* v. *Randolph*, *supra*, *cit.*

III.

The bond was not approved by the judge granting the writ.

In *O'Reilly* v. *Edrington*, 96 U. S., 724, on motion to dismiss an appeal where the bond had been approved by the clerk of the court below, instead of by the judge, this court held the objection to the regularity of the appeal on this ground, under R. S. Section 1000, to be well taken, for the reason that the power and duty of approving the bond could not be delegated by the judge to the clerk. Inasmuch, however, as the appeal had been otherwise regularly taken, this court exercised its discretion and gave the appellant an opportunity to supply this defect by filing a properly approved bond.

The same rule was applied in

National Bank v. *Omaha*, *ibid*, 737.

It follows, *a fortiori*, that approval of the bond is, under R. S. Section 1000, an indispensable element, in the absence of which the writ cannot act as a *supersedeas*.

See also

United States v. *Dashiel*, *supra*.

Nor is there any room for the inference that the bond was approved, as in *Davidson* v. *Lanier*, 4 Wall, 454, and other similar cases where particular facts warranted such inference to be drawn. Here the bond was executed before a County Judge, many hours travel from Albany, where the writ was allowed, and there is nothing to indicate that the judge who allowed the writ had any knowledge of the sufficiency of the sureties, or that the bond was necessarily before him at the time. It may be fairly assumed that in the latter event plaintiff would not have neglected to ask for a formal approval in accordance with the usual New York practice.

IV.

The bond and the sureties are insufficient.

The bond does not bind the heirs, executors, and administrators of the obligors. The term "successor" is applied more particularly and properly to corporations and not to individuals.

Bouvier's Law Dictionary.
Alger v. Fay, 12 Pick., 322.

In view of the affidavit of the cashier of the defendant in error (submitted to show that the attitude of defendant in error is taken for substantial and not merely technical reasons) the sureties cannot be said to have established their sufficiency merely by the *ex parte* affidavits drawn in the usual general terms, which are appended to the bond.

It is true that, for obvious reasons, the sources of affiant's information are not disclosed. But the burden of showing sufficiency is on the plaintiff in error, especially where there has been no approval of the bond, and where serious doubt is cast on the value of the proffered security.

The rule laid down by DRUMMOND, D. J., in *Hobson* v. *Johnson*, 4 Biss., 505 (s. c., 12 Fed. Cas. 267, No. 6553), that the affidavit of the surety, without appearance before the Judge taking the bond, should not be accepted as sufficient without further evidence of sufficiency, except in the absence of objection to the surety, should be applied.

It may be doubted whether the bond, having been executed *before issuance of the writ*, is effectual for any purpose.

In *Telegraph Co.* v. *Eyser*, 19 Wall, 419, the Court say with reference to the writ of error: "Its issuance must, of course, precede the execution of the bond."

The supersedeas should, therefore, be denied.

Washington, 23rd February, 1904.

JULIUS J. FRANK,
Attorney for Defendant in Error.

Affidavits.

Supreme Court of the United States.

No. 267—October Term, 1903.

CLARENCE T. BIRKETT, Plaintiff in error,
versus
COLUMBIA BANK, Defendant in error.

STATE OF NEW YORK,
County of New York, } *ss.:*

Walter S. Griffith, being duly sworn, deposes and says: That he is the cashier of the above-named defendant in error and has been such since the commencement of the action wherein the judgment under review herein was entered.

That in October, 1903, deponent caused an investigation and inquiry to be made, both through commercial agencies in the City of New York and through local bankers in the neighborhood of the place of residence of the sureties named in and who executed the bond referred to in the moving papers herein, as to the sufficiency of such sureties; that the facts resulting from such investigations showed that Laura R. Birkett, one of said sureties, who is the wife of the above-named plaintiff in error, seemed to be irresponsible and that Clarence H. Ferenbaugh, the other of such sureties, was not a man of large means and, owing to large indebtedness for borrowed money, was not entitled to credit beyond moderate amounts, and that it was problematical whether, in case of ultimate recovery by the defendant in error herein, the amount of the judgment appealed from could be collected from such surety.

That upon communication of these facts by the defendant in error to its attorney and counsel herein, Mr. Julius J. Frank, said attorney, as appears from the correspondence which deponent has read, informed the attorney for the plaintiff in error of such facts and requested him to submit, by way of justification of the sureties or otherwise, facts showing the responsibility and sufficiency of such sureties, in default whereof the defendant in error would issue execution to collect the judgment under review; that although at first attorney for the plaintiff in error expressed his willingness so to do, he finally refused to comply with the request of the attorney for the defendant in error. That it appears from such correspond-

ence that the attorney for the defendant in error suggested to the attorney for the plaintiff in error that the latter might himself take the depositions of such sureties and submit the same to him.

That defendant in error would not have issued execution herein had it not been convinced of the insufficiency of the sureties on said bond, and that its attorney in said correspondence with the attorney for the plaintiff in error waived compliance with all technicalities and forms of procedure and requested merely to be satisfied of the sufficiency of said sureties, or, in case of their insufficiency, the substitution of a sufficient bond or undertaking for the one filed herein.

That on March 31st, 1903, the above-named defendant in error, by its president, was served with a paper, appearing to be a copy of a bond or undertaking executed by the sureties referred to in the moving papers and by the above-named plaintiff in error; that said paper did not bear any endorsement, or any other entry or statement of any kind, indicating that it had been approved by any court or judge, or that it was a copy of an undertaking or bond given or filed in the office of the clerk of any court in the above entitled action.

WALTER S. GRIFFITH,
Cashier.

Sworn to before me this 13th day of February, 1904.

GEORGE STOLL,
Notary Public,
Westchester Co.

[SEAL.]

Certificate filed in New York Co.

Supreme Court of the United States.

No. 267—October Term, 1903.

CLARENCE T. BIRKETT, Plaintiff in Error,
versus
COLUMBIA BANK, Defendant in Error,

STATE OF NEW YORK,
County of New York, } *ss.:*

John E. Donnelly, being duly sworn, deposes and says: That he is an attorney at law, duly admitted to practice in the Courts of the State of New York and during the year 1903 was managing clerk in the office of Julius J. Frank, the attorney for the defendant in error herein.

That during the first week of October, 1903, deponent made diligent search among the records and papers on file in the office of the Clerk of the County of New York and made diligent inquiry of the clerks in that office in charge of Writs of Error from this Court to the Justices of the Supreme Court of the State of New York and of other papers usually filed therewith, for a copy of the Writ of Error in the above entitled action. That deponent failed to find any copy of such Writ in said office or any record or entry of any record of such copy having been lodged or filed therein at any time from and after the 18th day of March, 1903.

That deponent was then informed by the Record Clerk and Deputy County Clerk that no such copy had been lodged in said office during said period. That deponent requested said Deputy County Clerk to furnish him with a certificate to the effect that no such copy Writ had been filed or lodged in said office during said period, but said clerk, while admitting this to be the fact, declined to make such certificate for the reason that it was contrary to the practice of the office of said county clerk to make certificates of the absence of papers from the files or custody of said office.

JOHN E. DONNELLY.

Sworn to before me this 17th day of February, 1904.

JACOB SCHLAMP,
Notary Public,
New York County.

Supreme Court of the United States,

No. 267—October Term, 1903.

CLARENCE T. BIRKETT, Plaintiff in Error,
versus
COLUMBIA BANK, Defendant in Error.

STATE OF NEW YORK,
County of New York, } *ss.:*

Joel Del Monte, being duly sworn, deposes and says: That he is a clerk in the office of Julius J. Frank, the attorney for the defendant in error herein.

That on the 15th day of February, 1904, deponent made diligent search among the records and papers on file in the office of the clerk of the County of New York and made diligent inquiry of the clerks in that office in charge of writs of errorfrom this court to the justices of the Supreme Court of the State of New York, and of other papers usually filed therewith, for a copy of the writ of error in the above entitled action.

That deponent failed to find any copy of such writ in said office or any record or entry of any record of such copy having been lodged or filed therein at any time from and after the 18th day of March, 1903.

That deponent is informed by the clerks in charge of said records that no such copy had been lodged in said office during said period. That deponent requested the Deputy County Clerk to furnish him with a certificate to the effect that no such copy writ had been filed or lodged in said office during said period, but said Clerk, while admitting this to be the fact, declined to make such certificate for the reason that it was contrary to the practice of the office of said County Clerk to make certificates of the absence of papers from the files or custody of said office.

Deponent further says that he found on file in said office a bond for the prosecution of the Writ of Error in the above entitled action, dated and filed April 22, 1903, and that the same bears no endorsement or other entry of approval by any Judge or Court, and that the record in said office of the filing of said bond bears no such entry or endorsement.

JOEL DEL MONTE.

Sworn to before me this 17th day of February, 1904.

MILTON MAYER,
Notary Public, N. Y. Co.

Supreme Court of the United States,

No. 267—October Term, 1903.

CLARENCE T. BIRKETT, Plaintiff in Error,
versus
COLUMBIA BANK, Defendant in Error.

STATE OF NEW YORK, County of New York, } ss.:

Edwin C. Hamburg, being duly sworn, deposes and says: That he is an attorney at law, duly admitted to practice in the Courts of the State of New York; that he was, at the times hereinafter specified, a clerk in the office of Julius J. Frank, the attorney for the defendant in error herein.

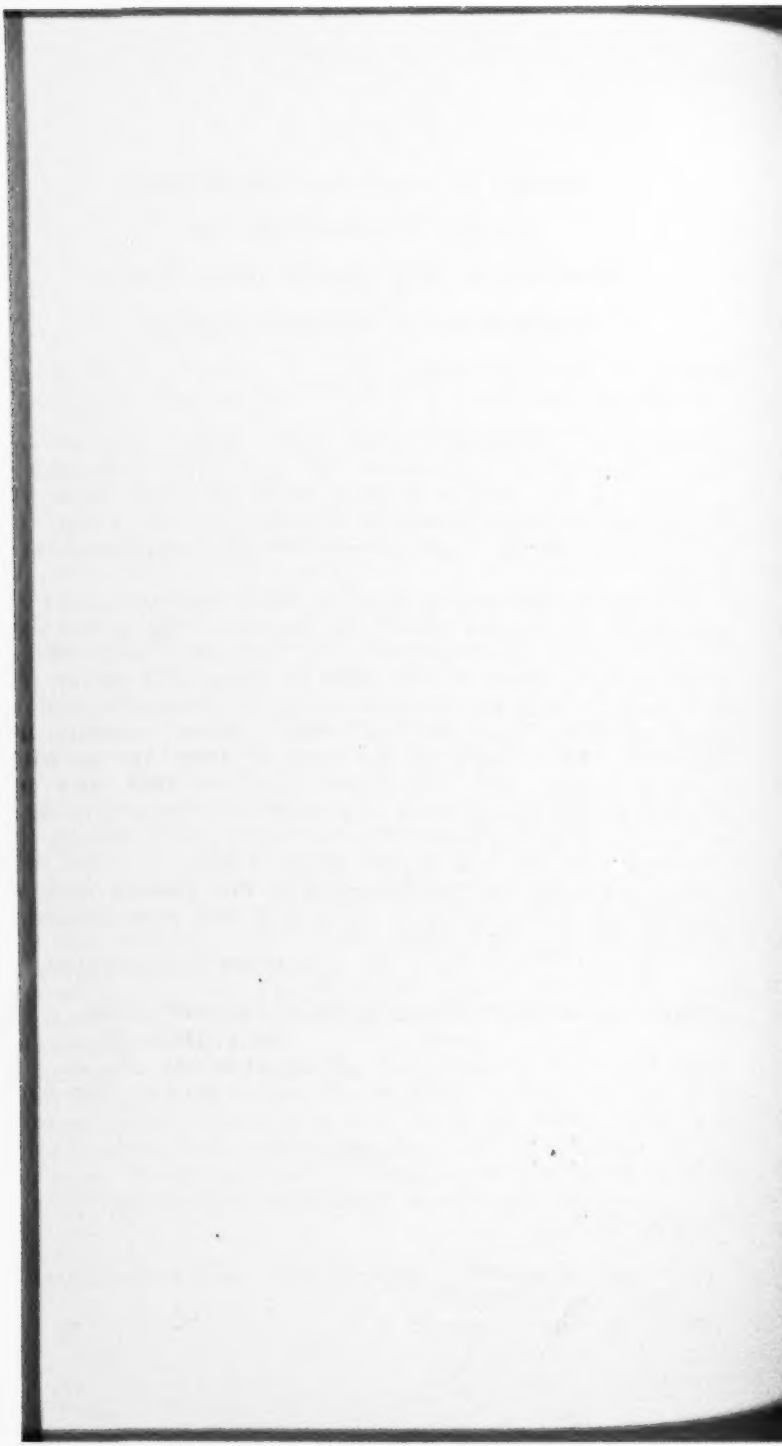
That on the 19th day of October, 1903, deponent made diligent search among the records and papers on file in the office of the Clerk of the County of New York and made diligent inquiry of the Clerks in that office in charge of writs of error from this Court to the Justices of the Supreme Court of the State of New York and of other papers usually filed therewith, for a copy of the writ of error in the above entitled action. That deponent failed to find any copy of such writ in said office or any record or entry of any record of such copy having been lodged or filed therein at any time from and after the 18th day of March, 1903.

That deponent was then informed by the Record Clerk and Deputy County Clerk that no such copy had been lodged in said office during said period.

EDWIN C. HAMBURG.

Sworn to before me this 17th day of February, 1904.

M. A. HESSEL,
Com. of Deeds, No. 60,
City of New York.



FILED
OCT 14 1904
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 26.

CLARENCE T. BIRKETT,
Plaintiff-in-Error,

vs.

COLUMBIA BANK,
Defendant-in-Error.

Brief for Defendant-in-Error.

JULIUS J. FRANK,
Attorney for Defendant-in-Error,
59 William Street,
New York.

APPEAL PRINTING CO., 15 Vesey St., New York. TEL. 1501 CORTLANDT.

United States Supreme Court.

No. 267, October Term, 1903.

CLARENCE T. BIRKETT,
Plaintiff in Error,
versus
COLUMBIA BANK,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

Plaintiff below sued, in the Supreme Court of the State of New York in and for the County of New York, as the holder of a promissory note made by the firm of Russell & Birkett, of which defendant below is the surviving member. The answer, after expressly admitting the allegations of the complaint, sets up the discharge of said defendant's firm in bankruptcy, that the note in suit was duly presented and proved in said bankruptcy proceedings, and the plaintiff's claim thereon was released by said discharge (p. 4). On the trial the allegation that the note in suit was thus presented and proved was withdrawn (p. 11).

The said firm of Russell & Birkett on February 15, 1899, had made and delivered the note in suit to the order of the Manhattan Railway Advertising Company, promising thereby to pay on April 5, 1899, $750 (p. 6). Before maturity, said note duly became the property of plaintiff (p. 7), which, at the makers' direct request (Ex. 2, p. 14), extended the time of payment until April 12th, after they had unsuccessfully sought an extension through the intercession of the payee (p. 13, Ex. 1).

On the date of expiration of the period of extension the makers filed their petition in bankruptcy in the Northern District of New York (p. 14), and on April 15, 1899, they were duly adjudged bankrupts (Ex. A, p. 15). In the schedule filed with their petition the debtors stated that the name of the creditor under, and last holder of, this note known to them was the Manhattan Railway Advertising Company (p. 17, Ex. C); they omitted all mention of the name or address of the plaintiff and caused notice of their adjudication and to attend the first meeting of their creditors to be sent to said Manhattan Railway Advertising Company instead of to plaintiff (p. 12, Ex. D).

A jury having been waived, the Trial Court found, in addition to the facts alleged in the complaint, that prior to the maturity of the note the defendant and his firm, the makers of said note, had actual knowledge of the fact that the plaintiff was then the owner and holder of the same (p. 7); that said firm after such maturity were adjudicated bankrupts upon their own petition (p. 7); that the defendant was thereafter discharged in bankruptcy (p. 7); but that plaintiff's claim and the debt of defendant's firm and of the defendant to the plaintiff, upon said note, were not duly scheduled in time for proof and allowance with the name of the plaintiff, which, at the time of filing their schedules in bankruptcy, was known to the bankrupts to be the owner and holder thereof and the creditor of said bankrupt by reason thereof (p. 7); that plaintiff had no notice or actual or other knowledge of said proceedings in bankruptcy prior to the discharge of the bankrupts therein (p. 7); and that no notice of any of said proceedings was at any time given to the plaintiff, by, or by the direction of, said bankrupts or either of them (p. 7). The court also found, as conclusions of law, that the claim of the plaintiff upon said note was not and is not barred or discharged by the defendant's said discharge in bankruptcy, and that at the date of said decision there was due and owing to plaintiff from the defendant thereon the full amount thereof, with interest (p. 7).

The defendant having appealed from the judgment entered against him in the Trial Court (p. 8), the same was unanimously affirmed (p. 20) in the Appellate Division (65 App. Div., 615), and upon his further appeal, in the Court of Appeals, VANN, J., dissenting (174 N. Y., 112; Record, p. 23), whereupon he sued out a writ of error removing the cause to this court (pp. 30, *et seq.*).

POINTS.

I.

The writ should be dismissed or the judgment affirmed because of failure to transmit any assignment of errors with the record.

The record fails to comply with the requirements of R. S., § 997, and as no "plain error" appears therein the uniform practice of the court should be followed in this case.

Lucas vs. Brook, 18 Wall., 436.
Portland Co. vs. U. S , 15 *id.*, 1.
Ryan vs. Koch, 17 *id.*, 19.
Treat vs. Jemison, 20 *id.*, 652.
Maxwell vs. Stewart, 21 *id.*, 71.
Scholey vs. Rew, 23 *id.*, 331.
Rowe vs. Phelps, 152 U. S., 87.

United States vs. *Pena*, 175 U. S., 500, is not inconsistent with *Rowe* vs. *Phelps*, *supra*, and other earlier cases on the subject, as it merely reiterates the doctrine that the court is not *compelled* to dismiss for absence of assignment of errors, but "may, at its option, notice a plain error not assigned." But this is within the discretion and option of the court, and it would seem that the error must be so plain as to appear almost without argument to move the court to relieve the plaintiff in error from the explicit requirements of the Statute and Rule 21 (Subd. 4).

II.

The cause of action was not barred or discharged by the discharge in bankruptcy.

Subd. *a* of §58 of the Act provides that notices be sent to creditors, at

> "their respective addresses *as they appear in the list of creditors* of the bankrupt, or as afterwards filed * * * by the creditors."

But the Act makes it the duty of the debtor in order to enable the Referee to comply with this requirement, to file with his petition,

> "*a list of his creditors showing their residences if known*, if unknown that fact to be stated," &c. (§7, Subd. 8).

It is therefore, not inaccurate to say that in a sense notices sent in the course of the proceedings are sent by the bankrupt's "direction." It certainly should not be open to a bankrupt, who has failed to place the Referee in position to notify his creditor, to avail himself of his own default, to defeat payment of that creditor's claim.

The plaintiff in error claims that the Court has charge of the subsequent proceedings after the filing of the schedules. This also may be admitted. But it is to be noted that the defendant in error is not urging against the effect of the bankrupt's discharge any act or omission of the Court or Referee, but the deliberate omission of the defendant himself prior to the point of time when the Court took charge, and while the proceeding was still in his sole and entire control. If there was no burden upon the bankrupt to notify his creditors there was indisputably the duty to inform the court in the prescribed statutory manner who his creditors were, and where notices would reach them.

Finally the court, if necessary to sustain the judgment, will experience no difficulty in finding in the record sufficient

proof to support a finding that no notice was sent to plaintiff by the Court or Referee. There can be no question of the Court's power to do this.

Ogden v. Alexander, 140 N. Y., 356, 362.

The debtor himself testified that the only notice of which there was any proof offered, was sent not to plaintiff, but to a third party (p. 12, Ex. D, also Ex. C). Had it been possible to show notice also to the plaintiff below we may assume that proof of the fact would not have been lacking.

THE ACT OF 1898 SHOWS MARKEDLY THE INTENT OF CONGRESS TO MAKE ACTUAL NOTICE TO CREDITORS OF EVERY IMPORTANT STEP A CONDITION PRECEDENT TO THE BARRING OF THEIR CLAIMS AGAINST THE BANKRUPT.

The Act of 1841 (§7) required notice of meetings of creditors by publication only. The Act of 1867 (§11), while providing for such notice by mailing to each scheduled creditor, authorized the Court to dispense therewith, and substitute therefor notice by publication (Act of June 22, 1874, §5).

The Act of 1898 (§58*a*) *requires* notice by mail to each *scheduled* creditor, and permits of no *alternative* or *substituted* service, though publication is authorized *in addition to* mailing. In order to overcome the objection of possible disproportionate expense, the Referee is authorized in mailing notices to use a government penalty envelope dispensing with the necessity of paying postage.

Loveland on Bkcy., p. 98, n3.

The Act of 1867 (§28) prescribed no manner of giving notice of the filing of Trustees' accounts; required (§27) notice of dividends to be given only to creditors who had proved their claims; notice of application for discharge (§29) only to such as had proved their claims; and generally, as to all meetings after the first (§17) left the manner of giving notices to the discretion of the Court.

The Act of 1841 permitted all notices to be given by publication (§§4, 7, 10), discretion being vested in the Court to require personal notice in the case of applications for discharge.

Under the Act of 1800 the only prescribed method of notice was by publication (§§6, 29). In some instances, as in case of application for discharge, no notice is prescribed.

The Act of 1898, on the other hand, requires *notice by mail* of every step in the proceeding to every creditor *named in the schedule*, or who has otherwise become a party as stated in the Act. (Cf., §§58, 14 Subd. b., 39 Subd. 4, 59 Subd. d.). In contrast with the earlier Acts the *schedule* is made the basis of notification, and not the fact that the creditor has proven his debt.

The same policy and intent of the Legislature further appear upon a comparison of the provisions relating to the effect of the discharge of the bankrupt.

Under the Act of 1800 the discharge barred all debts which might have been proven against the bankrupt.

Under the Act of 1841 (§4), the discharge and certificate

> "shall in all courts of justice be deemed a full and complete discharge of all debts * * * of such bankrupt which are *provable under this Act* * * * and the same shall be conclusive evidence of itself in favor of such bankrupt"

unless impeached for fraud, etc.

The Act of 1867 (§34) made the discharge effectual to

> "release the bankrupt from all debts * * * *which were or might have been proved* against his estate in bankruptcy. It may be pleaded by a simple averment * * * as a full and complete bar to all suits brought on any such debts," etc. (U. S. R. S., §5119).

Under the Act of 1898 (§17) the discharge releases the bankrupt from *all his provable debts except such as* * * *

> "3. *Have* not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to

the bankrupt, unless such creditor *had* notice or actual knowledge of the proceedings in bankruptcy."

The use of the terms "*have not been*" and "*had*," signifying action *accomplished*, instead of the future or a subjunctive form, compels the conclusion, confirmed by the nice discrimination with which words of tense are employed throughout the section, that the due scheduling as well as the creditor's knowledge or notification which bring a debt within the operation of a discharge must *precede* the latter. The term "had" in the last clause of the subdivision reenforces this interpretation and is, in fact, inconsistent with any other. Whatever be the function of the phrase, "in time for proof and allowance," the failure to repeat it or to refer to it in the final member of the subdivision leaves that member unqualified by it.

It is plain that the phrase was added for the *creditor's*, not the bankrupt's, protection. Far from extending, it sets an additional limit to the time within which a debt must be scheduled to be discharged. Creditors have but a year after the adjudication within which to prove claims (Sec. 57, *n*), while the bankrupt may delay his application for a discharge until eighteen months thereafter (Sec. 14, Subd. *a*).

The bankrupt may, within the prescribed period, select his own time for instituting the proceeding for his discharge, and it depends on the record made by him who shall be notified thereof. The only logical and just construction, therefore, of the provision under consideration is that, as the effect of the discharge is immediate, its scope must be measured by the record *as it exists when the order is made*. The bankrupt, not the creditor, must take the risk of the state of the record, and it would be contrary to every dictate of equity and reason to bind by the discharge any creditor whose notice of the bankruptcy proceedings post-dated the order, unless he had *theretofore* been duly scheduled *within the period for proving claims*.

The entire Act shows the purpose to remedy an evil existing under the former Bankruptcy Acts, by no longer exposing the creditor to the hazard of substituted notice and giving him instead the benefit of direct and actual notice of the steps contemplated by the bankrupt in the prosecution of measures to escape the demands of creditors. The one single exception of which the Act gives the bankrupt the benefit, viz.: notice or actual knowledge to, or of, the creditor, notwithstanding the failure of the debtor to schedule his name and address, makes only more clear the intent of Congress.

Nor, in contradistinction to the former Bankruptcy Acts, is the creditor to be deprived of the opportunity to oppose the debtor's discharge even though the creditor may not have been sufficiently active in his own behalf to make proof of his claim. It is enough that he is a creditor and that the bankrupt knows him to be such, and his address. There is no presumption possible, under the Statute, that the bankrupt is ignorant in either particular, unless he says so in his schedules.

The wisdom of Congress is well shown by the facts at bar, which illustrate how easily a dishonest bankrupt, in collusion with an intermediate creditor (here the payee of the note in suit) may, while observing the forms of law, profit by the Act, even to the extent of securing to himself the payment of dividends through such intermediate creditor in fraud of the real creditor, whose name and address he knows, and from whom he deliberately conceals all knowledge of the proceedings by the simple device of causing all notices to be sent to his confederate. If this can be done through an intermediate payee, it can be done through one who has assigned his claim without recourse, or even through an entire stranger—depending entirely on the elasticity of the bankrupt's conscience; and if it can be done as to one claim against the bankrupt, why not as to a larger number, if absence of creditors or other circumstances should seem to make such a course safe from detection until after the distribution of the estate and the discharge of the bankrupt?

Upon the theory of plaintiff in error final success would be assured by conveying knowledge of the bankruptcy to the defrauded creditor *a day before the expiration of the time for proof and allowance of his claim.*

Plaintiff in error urges that there is no suggestion that defendant has been deprived of any substantial right. It would seem that the absence of such deprivation should be proven by the defendant. But, waiving this, the creditor *has been deprived* of the right and opportunity to participate in the selection of a trustee (Bank'cy. Act, §44); to examine the bankrupt (*id.*, §7) and to oppose the application for his discharge (*id.*, §14). It has lost the benefit of the first meeting of creditors, and the opportunity to participate in all the other proceedings for which notice is prescribed in §58 as the creditors' absolute right "unless they waive notice in writing." Possibly the only dividend declared by the estate was paid before the plaintiff's discovery of defendant's bankruptcy. Presumably, if there was a dividend, it was paid to the Manhattan Co., falsely scheduled by the defendant as the owner and holder of the plaintiff's note. What "substantial right" was then left to plaintiff? The defendant replies, the right to move to set aside the discharge. But even in this respect the plaintiff is at a serious disadvantage: While the plaintiff, if notified as contemplated by the Statute, could have examined the bankrupt at such length and with such latitude, as the act permits (§7, Sub. 9, §21, §58, §9b), and would thus have been able to learn whether facts existed warranting the withholding of a discharge, and available in opposition to an application therefor, it could, after its discovery of its debtor's bankruptcy, urge the revocation of the discharging order only if prepared to establish affirmatively "upon a trial" that "it was obtained through the fraud of the bankrupt," in addition to the other facts which prior to the discharge would alone have been sufficient to defeat the bankrupt's application (§15). Assuming as we must, the absence of fraud in obtaining the discharge, the plaintiff would

thus be forever barred and deprived of any and all benefits of the bankruptcy proceeding.

If the reasoning of the plaintiff in error be sound it is applicable to a case where a creditor, from whom the bankrupt has deliberately kept all knowledge of his bankruptcy, casually discovers the fact on the eve of the expiration of the time in which he might have proven his debt, or made application to set aside the discharge! This *reductio ad absurdum* plainly reveals the fallacy of the argument, and the untenability of the position of the plaintiff in error.

Such a construction of the Act, substituting notice at a time when it cannot be practically availed of, for the statutory notice affording ample opportunity for hearing (§58), would be contrary to reason and justice, and would deprive the creditor of his property without "due process of law" as defined by EARL, J., in *Stuart v. Palmer*, 74 N. Y., 183, 191, as follows:

> "Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this."

In the same case it was said (p. 188):

> "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must *require* notice to them and give them the *right* to a hearing and an opportunity to be heard."

Cited with approval in Montana Co. vs. St. Louis Co., 152 U. S., 160, 169.

In the face of Exhibits 1 and 2, and with no suggestion of any fact in the Record to sustain it, there can be no attempt to excuse the failure to schedule the note in the name of the true owner and holder thereof worthy of serious consideration.

The coincidence of the filing of the petition in bankruptcy with the date of expiration of the extension obtained from the plaintiff on the faith of the debtors' promise positively to pay their debt made on the very eve of their bankruptcy, and plainly with no intention of performance (Ex. 1), together with the lame and disingenuous attempt to break the force of this damaging fact (p. 15) warrant the finding of wilful and even fraudulent omission of plaintiff's name from the schedules, which, even under the Act of 1867, would have "prevented the operation of the discharge on the claim held by the omitted creditor."

Poillon v. Lawrence, 77 N. Y., 207.
Batchelder v. Low, 8 Natl. Bank. Reg., 571, 572.
Matter of Kalish, Deady, 575.

The Trial Court found (p. 7), *and the finding neither was nor could be challenged or questioned*, that the bankrupts knew that the plaintiff was the owner of the note in suit before they filed their petition and schedules, notwithstanding which they deliberately falsified the fact in their schedules (Ex. C), thus keeping all notice of their bankruptcy from the plaintiff (p. 12).

In *Batchelder v. Low* (*supra*), the court, per WHEELER, J., said, p. 572:

> "It is a fundamental principle in relation to judicial proceedings that all persons between whom such a proceeding is pending must have proper notice of, and opportunity to be heard in, it before any judgment can be rendered upon it that will bind them. The Bankrupt Act recognizes this rule of law, and, in accordance with it, requires the bankrupt to annex a schedule of the debts he owes and the names of the persons to whom due, to his petition * * * The schedule is the sole foundation for personal notice of the proceedings at any stage of them to the creditors who are not already parties * * * The defendant, therefore, by the schedule annexed to his petition, and sworn to by him, furnished the only basis for personal notice direct to the creditors against whom he

was proceeding to obtain this judgment of discharge. If he omitted this note (the claim in suit), and the name of the person to whom it was really due, he kept the foundation for notice of the proceedings to these persons away from the Court of Bankruptcy. If he did that fraudulently, and by that means they failed to receive notice, then he fraudulently deprived them of the notice of, and of the opportunity to be heard upon, the proceedings which they were entitled to * * * This is not an ordinary judgment. * * * But although peculiar in form and effect, it is an adjudication upon proceedings *upon which all parties interested should have all the notice which the law provides for them;* and when the party procuring it fraudulently deprives such parties of all direct notice that the law entitles them to, and proceeds to judgment without such notice to them, the judgment, such as it is, although it may be valid to all persons who had notice, should be void as to those who did not."

In *Tyrrel vs. Hammerstein*, 33 Misc. (N. Y.), 505, cited by the Court below (p. 9), we have a parallel case. It was there said by McADAM, J.:

"The next defense is a discharge in bankruptcy granted by the United States District Court, whereby the defendant was discharged from all provable debts and claims which existed against him April 10, 1899, on which day his petition for adjudication was filed. The plaintiff's cause of action existed January 21, 1898, but he claims it was not discharged, because it was not entered upon the schedules filed, and he was not recognized as a creditor in the proceeding. This is founded on Section 17 of the Act of 1898, which expressly excepts from the operation of the discharge debts which 'have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.' See also Collier Bank. (3d Ed.), 197, 198.

"Under the former Bankruptcy Act, which contained no such exception, the discharge was a bar, even though the creditor owning the demand was omitted from the schedule and received no notice of the proceeding, pro-

vided such omission was not wilful or fraudulent (citing cases). The most pertinent inquiry, therefore, is, what was the defect in the former provision that Congress intended to remedy by the new one, for we must hold that the amendment was not made without a substantial purpose. *The change most clearly indicated is that where the creditor has neither knowledge nor notice of the bankruptcy proceedings, his debt, if not duly scheduled, with his name, if known to the bankrupt, is not to be discharged, whether the omission is fraudulent or otherwise.* This would seem to be the application by Congress to bankruptcy proceedings of the familiar constitutional principle that 'due process of law' intended to deprive one of property contemplates notice of some kind to the party whose property is to be taken that he may have his day in court and to be heard before the court adjudicates against him (Cooley Const. Lim., 3d Ed., 353). *The plaintiff knew nothing of the bankruptcy proceedings until after the discharge*, while the defendant, as well as his agents, knew of the plaintiff's claim, so that there was no good reason for omitting it from the schedules. * * * The defendant had no right to altogether ignore the plaintiff and *his* demand, unless he intended, as the Act proclaims, that the plaintiff should not be bound by the proceeding in which he was so ignored. The plaintiff is, therefore, entitled to judgment."

The main point on which this decision turned was the failure of the bankrupt to give the court the information necessary to enable the referee to give notice to his creditor. That *the existence of the debt*, as well as the name of the creditor, was concealed does not add conclusiveness to the reasoning of the court, or make the decision less applicable to the case at bar.

III.

The discharge was insufficiently pleaded, and the facts proven in support of the answer did not sustain the defence.

It is well settled that where a party claims the benefit of a statute as a release from an otherwise valid and existing indebtedness, he will be held to strict pleading, and that, where such statute contains an *exception*, he must not only strictly plead the statute, but with equal strictness plead facts *negativing the exception.*

1 Kent Com., 463.
Harris v. White, 81 N. Y., 532, 538-9, 546-7.
Jones v. Axen, 1 Ld. Raym., 119, 120.
Spieres vs. Parker, 1 Term R., 141.

"A proviso differs from an exception. An exception exempts, absolutely, from the operation of an engagement or enactment; a proviso defeats their operation conditionally. An exception takes out of an engagement or enactment something that would otherwise be part of the subject matter of it; a proviso avoids them by way of defeasance or excuse."

Bouvier's Dictionary.

In *Sedgwick, Constr. St. & Const. Law*, p. 50, it is said:

"There is a well known distinction between an exception in the purview of the Act and a proviso. If there be an exception in the enacting clause of the statute it must be negatived in pleading; but a separate proviso need not."

See also Potter's Dwarris on Statutes, p. 119.

In *Rowell vs. Janvrin*, 151 N. Y., 60, it was said per O'BRIEN, J., at p. 66:

"In stating a cause of action arising upon a statute, it is an ancient rule that where an exception is incorporated in the body of the clause of the statute, he who pleads

the clause ought to plead the exception. But where there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he may plead the clause and leave it to his adversary to show the proviso. (Jones v. Axen, 1 Ld. Raym., 120.) This rule of pleading has been followed and applied in a great variety of cases arising upon statutes and contracts to this day."

Moreover the facts relied upon to warrant the application of the excepting provision as matter of law

"must appear to be conclusively established by some affirmative finding."

Peo., &c., vs. Scannell, 172 N. Y., 316, 321.

Subd. 3 of §17 of the Act of 1898 is explicitly termed, and manifestly creates, an *exception* to the otherwise universal operation of the discharge. As such it must be negatived by pleading and proof. The answer fails entirely to do this. There is neither averment nor proof that the debt in question was duly scheduled, with the name of the creditor (plaintiff) or that plaintiff's name was not known to the bankrupts or that plaintiff had notice or actual knowledge of the proceedings in bankruptcy. The allegation in the answer that the note in question was presented before the Referee, in the absence of an averment that *plaintiff* presented it, did not cure the defect under discussion, and on the trial was abandoned (p. 11). The remaining averments as to the effect of the discharge are merely conclusions of law.

This point was seasonably urged by motions for judgment on the answer, both on the opening and the close of the case (pp. 11, 15).

IV.

The burden of proof was throughout on the defendant.

This follows necessarily from the proposition considered under Point III, and from the provisions of the New York Code of Civil Procedure.

The plaintiff's entire cause of action was admitted by the answer, which opposed thereto merely an affirmative defence (p. 4). Under the New York system of pleading no reply was required or permitted to this defence, unless ordered by the Court on defendant's application.

The provisions governing the subject are the following:

"§514. *Reply; what to contain.* Where the answer contains a counterclaim, the plaintiff, if he does not demur, may reply to the counterclaim."

"§516. *Cases where the Court may require a reply.* Where an answer contains new matter, constituting a defence by way of avoidance, the Court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter."

"§522. * * * But an allegation of new matter in the answer, to which a reply is not required, * * * is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires."

"§532. *Judgment; how pleaded.* In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction."

By virtue of these provisions the allegations of the defendant's discharge stood as controverted and the defendant was bound to establish the same fully, including "the facts conferring jurisdiction."

V.

The defendant did not sustain the burden of proof.

In addition to other shortcomings in the proof pointed out under Point III the defendant made no attempt to show any facts conferring jurisdiction on the Court in which he claimed

to have received his discharge. The copy of the Order for Discharge introduced in evidence (p. 16, Ex. B), is not certified, and was not described as being certified when offered (p. 11). It therefore lacks the probative force with which the Act clothes a "*certified copy* of an order * * * granting a discharge" (§21, subd. *f*). As the Act is in derogation of the common law, it must be strictly construed, and defendant must be held to a literal compliance with its provisions. Even the production of the original order, had that been possible, would not have answered the requirements of the rule of evidence created by the Act and invoked by the defendant.

The defendant made no request of the Court to find, and the findings do not show, that plaintiff had notice or actual knowledge of the proceedings in bankruptcy *at any time.* There is therefore *no finding or request to find improperly refused, that it had such knowledge in time to prove its claim and have the same allowed.* This alone is enough to dispose of the entire argument of plaintiff in error in so far as it rests on this assumed fact, it being settled that no fact can be considered by the Court of Appeals of New York for the purpose of *reversing* a judgment unless it is either found or requested to be found on uncontroverted evidence.

Koehler v. Hughes, 148 N. Y., 507, 515.

This rule is applied generally in Courts of review including this court.

It is further settled in this court that

> "Whatever was matter of fact in the Court whose judgment or decree is under review is matter of fact here."

per MR. JUSTICE MCKENNA, in

Eastern Building & Loan Assoc'n vs. Ebaugh, 185 U. S., 114, 121.

Citing

Hawley vs. Donoghue, 116 *id.*, 1;

and that the findings of fact in the lower court are conclusive in this court.

Minneapolis, &c., R. Co. vs. Minnesota, No. 138, Oct., 1903, Term.
Mining Co. vs. Land Co., No. 76, *ibid.*
Thayer vs. Spratt, 189 U. S., 346, 353.
Jenkins vs. Neff, 186 *id.*, 230, 235.
Western Un. Tel. Co. vs. Call Pub. Co., 181 *id.*, 92, 103.

In *Dooley* vs. *Pease*, 180 *id.*, 126, this court said at p. 131, by MR. JUSTICE SHIRAS:

> "Where a case is tried by the Court, a jury having been waived, its findings upon questions of fact are conclusive in the Courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different."

Citing Stanley vs. Supervisors, 121 *id.*, 547.

This court, therefore, will assume the correctness of the Ninth finding to the effect that the claim in suit was

> "not duly scheduled in time for proof and allowance," &c. (p. 7).

In the absence of any finding, or request therefor, that plaintiff had such notice or knowledge as alone would relieve the bankrupt from the effect of this omission, and make the discharge binding on the plaintiff it is legally impossible that the defence can succeed in this court.

VI.

The authorities cited in the learned dissenting opinion in the Court of Appeals are distinguishable, and are not inconsistent with an affirmance of the judgment under review.

Fider vs. Mannheim, 81 N. W. R., 2, is most nearly in point on the facts, and on it the plaintiff in error relied most strongly in the State Courts. That case may be conceded to

have been well decided on the facts. It is parallel to the case at bar to the extent that the defendant before filing his petition knew the plaintiff to be his creditor and did not schedule him as such. It is radically different in the facts, that within less than a month after the filing of the petition (we quote from the opinion)

> "plaintiff knew that the defendant had gone into bankruptcy and *had not then been discharged.* Plaintiff admitted repeatedly * * * that he was informed of the fact early in November *by defendant* and others. * * * He also had ample time thereafter in which to prove his claim if he desired to do so, and have it allowed, as the *judgment of discharge was not entered until the following May.*"

The court indicate plainly that they would not have considered the knowledge acquired by the creditor to have been sufficient if he had not had it in time "for proof and allowance" of his claim *before the bankrupt's discharge.* The fact that during six months he might have actively intervened in the proceedings in the Bankruptcy Court evidently controlled the court's decision, which perhaps was not entirely uninfluenced by the fact that the omission of the creditor's name from the schedules was clearly an inadvertence, which the bankrupt took care to correct almost immediately by personal notice to his creditor.

The court, as a matter of ordinary justice, refused to allow the creditor deliberately to ignore proceedings of which he had knowledge in ample time for all practical purposes, which the statute therefore made binding on him, and the effect of which he was endeavoring to escape by insistence on a technical and harmless oversight on his debtor's part.

In the case at bar, however, we have the converse of that case: a deliberate concealment by the debtors of the pendency of all proceedings from the creditor, and their prosecution to the order of discharge admittedly without any notice to, or knowledge by it. If it be assumed that plaintiff here ac-

quired such knowledge within the statutory time for merely proving its claim, the equities would still be with the plaintiff, and the defendant would be in the position of unfair and unjust insistence on a technicality, in which the plaintiff was in the cited case. But, as already pointed out there is no such finding, and this court cannot find or assume that the plaintiff *at any time* acquired knowledge of the defendant's bankruptcy. The cited case, therefore does not apply.

Sherwood vs. Mitchell and *McCabe vs. Cooney* arose under the Act of 1841 and under a system of pleading no longer in vogue in New York. They turned largely on the fact that that Act created exemptions from the effect of a discharge in bankruptcy by "provisos," to which we have already drawn attention (Point III).

In *Brown vs. Broach*, on demurrer the court suggested (p. 541, and apparently *obiter*), that (syllabus),

> "It is bad pleading to aver in the declaration the grounds relied on to avoid a discharge in bankruptcy. Such matter should be set up in the replication to the plea of discharge."

Brereton vs. Hull seems to have been disapproved in *Caryl vs. Russell*, 18 Barb., 429.

Johnson vs. Ball and *Cutter vs. Folsom* are inapplicable because the question presented arose under the *provisos* of the Act of 1841 and involved considerations inherent in the forms of pleading in use in New Hampshire and which find no analogy in the Code system in New York.

Harrison vs. Lourie was decided at *nisi prius*. As the Bankruptcy Act of Great Britain, under which the question adjudicated arose, is not set out in the report of the case, it is not possible to tell to what extent, if any, the case sustains the proposition to which it is cited.

Chapman vs. Forsyth: A reading of the third question (2 How. U. S., 203) and of the entire answer thereto (*ibid.*, 208-9), the final paragraph of which only is

quoted at p. 29 of the Transcript of Record, makes it somewhat difficult to discover the appositeness of the cited case.

In *Stevens vs. King*, the only question raised as to the discharge in bankruptcy related to its admissibility in evidence in defendant's behalf, although

> "it was not shown that the plaintiff was a party to the bankruptcy proceeding and received notice thereof" (p. 378).

No such question is presented here. On the other hand, if the cited case correctly states the law the plaintiff at bar has complied with the conditions laid down by the learned court by showing "some cause why the decree of the court was not effectual" as to it. In this respect, in fact, the plaintiff has met even the requirements of the dissenting opinion herein in the Court of Appeals (p. 29).

Loveland on Bankruptcy discussing the effect of the discharge under the present and prior Acts says (§299, p. 639):

> "A creditor whose name has been omitted from the schedule, and who has had no notice or knowledge of bankruptcy proceedings, has not such an interest as will enable him to institute proceedings to vacate a discharge. The reason for this is that his debts are not effected by the discharge."

JULIUS J. FRANK,
Attorney and Counsel
for Defendant in Error.

Washington, April, 1904.

Supplemental Memorandum.

This memorandum is addressed to so much of the brief of plaintiff in error, filed April 29th, 1904, as may not have been sufficiently anticipated in our foregoing brief, filed April 26th, 1904.

VII.

The following statements of facts are not supported by any findings in the record.

> "The Columbia Bank had actual knowledge of the bankruptcy proceedings in time to prove their claim and have it allowed" (pp. 3 and 9).
>
> "The Columbia Bank had actual knowledge of the bankruptcy proceedings on or about 17th November, 1899" (p. 4).

The effect of the absence of such findings has already been pointed out (Point V, *supra*).

The following statements are neither supported by findings, nor by proof of any kind:

That the defendant in error had knowledge of the proceedings in bankruptcy in time "to obtain his dividends" (pp. 15, 20).

That the defendant in error

> "made no effort whatever to avail itself of the provisions of the Bankruptcy Law" (p. 18).

That there was no fraud in this case and the trial court refused to find any fraud (p. 19).

That

> "the Columbia Bank still has its remedy against the Manhattan Railway Advertising Company on its note" (p. 19).

That any of the things summed up in the statement: "This is what was undoubtedly done in this case" (p. 20) was done. These alleged occurrences are the merest assumption, for which there can be no room even by way of argument, when Exhibits 1 and 2 are borne in mind. On the other hand it is entirely within the range of probability that the bank lost its remedy against the payee and endorser by granting an extension directly to the makers (Transcript of Record, p. 14, original p. 26). There is no proof that the bank ever took the steps necessary to hold the endorser by presentation and protest of the note at maturity. If presumptions are permissible, the mere fact of the bringing of this action under the circumstances would seem to indicate that the holder of the note no longer had any remedy against the endorser.

The statements on page 15 as to failure to offer evidence by the defendant in error, on which to base its claim to the benefit of the exceptions in Section 17, while literally true, may be misleading unless it is remembered that such evidence was introduced by the plaintiff in error upon his examination by his own counsel (Transcript, 12, Original, 23, Finding X, page 7, Original 14).

VIII.

The plaintiff in error apparently assumes (p. 4) that he can in a brief supply the omission from the Record of Assignments of Errors. We submit that this is in no sense whatever a compliance with the plain requirements of the statute and that there is no authority permitting the amplification of the record in any such manner (Point I, *supra*). Rule 21, 2 (2) presupposes a compliance with the statute.

IX.

The complaint of the plaintiff in error (p. 14) as to the unreasonableness of burdening the bankrupt with proof of the steps leading to his discharge "every time a creditor chose to

attack his discharge" is irrelevant. There is here no attempt to "attack" the discharge. The defendant in error, assuming the validity of the discharge, and even, *arguendo*, that it has been properly proven, contends that it does not affect the claim in suit because of the bankrupts' deliberate omission to make their creditor a party to the bankruptcy proceedings. It may well be that this discharge is binding upon each and every creditor of the bankrupts, other than the Columbia Bank. The bankrupts, however, had the option so to conduct those proceedings as to leave the claim of Columbia Bank entirely unaffected thereby. Whatever the motive may have been, whether honest or dishonest, they seem to have elected thus to proceed. Having done so, they cannot now claim that the effect of the discharge shall be precisely the same as though they had, in the full performance of their duty to all of their creditors, including the Columbia Bank, taken such steps as would have given the bank an opportunity to be heard at the various stages of the proceeding—to have its day in the District Court.

Whatever may be said by counsel in their brief, or in the authorities cited by them, as to the conclusiveness of proceedings *in rem*, it cannot be successfully contended that such proceedings may be conducted without regard to regularity of practice, or that the rights of parties interested therein can be thereby affected when they have not been conducted in strict conformity with all the requirements of law.

Plaintiff in error has been at great pains to refer to numerous provisions of the Bankruptcy Act in a labored attempt to prove that actual knowledge of the bankruptcy proceedings, at any time within the year permitted for the allowance of claims, is sufficient to make the bankrupt's discharge binding on the creditor having such knowledge.

We submit that these references only serve to illustrate the soundness of the position taken under our Point II, *supra*, and to strengthen the conviction that the construction of the Act for which plaintiff in error asks would pervert the statute

by enabling dishonest and designing bankrupts to use it as a weapon, instead of a shield. As already pointed out, it is impossible to adopt the reasoning of the plaintiff in error without holding, as an absolutely logical and necessary conclusion, that no matter how infinitesimal the time remaining between the creditor's obtaining knowledge or notice of the bankruptcy proceeding and the expiration of the period for proof and allowance of his claim, the discharge, obtained without notice to the creditor, will preclude him from any remedy against his debtor, even although it appear that, as a matter of physical possibility, there be not sufficient time for the bare ceremony of filing his claim for proof and allowance, and that meanwhile the entire estate has been distributed.

It would seem that the mere statement of the proposition most strongly shows its unsoundness.

The entire argument of the plaintiff in error assumes that the Bankruptcy Act was passed solely for the benefit of the debtor and imposes *duties* only upon the creditor. This idea finds expression in so many forms that it is unnecessary to cite particular passages in which it is embodied. The fallacy of the assumption need not be pointed out. Even though we agree that a most important purpose of the Act is to attain the application of the bankrupt's estate to the discharge of his indebtedness (p. 17), it must not be forgotten that the Act intends that the bankrupt's estate shall go, not to a few, *but to all* of the creditors, and that its beneficial results to the bankrupt depend upon, and are to follow only, a full, complete and absolutely strict compliance by him with its requirements and a punctilious discharge of all the duties which the Act imposes upon him from the very inception of the proceeding until his final discharge. The courts certainly never intended, in construing the Act as a remedial statute, to hold that the creditor should be deprived thereby of his remedies against his debtor, in other words of his property, in a case where the debtor in seeking the protection of the

Act, has wilfully done what he could to prevent the creditor's availing himself of such of its provisions as were devised to safeguard his rights. Such a construction would be contrary to the entire scheme and purpose of bankruptcy legislation.

X.

Authorities cited by plaintiff in error and not already considered in our principal brief.

Under Point II, page 11.

Jones vs. Walker decides nothing more than that on demurrer a petition sufficiently sets up proceedings under the Bankrupt Act in bar of an action to enforce a claim,

"if it be clearly shown that the creditor has actual knowledge of the application for the discharge in bankruptcy by the debtor and the pendency of the proceedings."

In *Zimmerman vs. Ketchum* the defendant answered, setting up his discharge in bankruptcy and, among other facts, plaintiff's appearance in the Bankruptcy Court including the proceedings for the discharge. Upon demurrer the answer was held to be sufficient, because it specifically alleged actual knowledge by the plaintiff, and his active participation in the bankruptcy proceedings, these facts being held equivalent to the scheduling of the debt under the Act.

It is not without interest to note that in this, as well as in the last preceding case, counsel did not think it sufficient to plead in general terms the granting of the discharge without specifically showing that the debts sued upon did not come within Exception (3) of Section 17 of the Act.

In *Smith vs. Wheeler*, the proposition to which the case is cited by plaintiff in error, was not even in the remotest degree involved, the only question there being whether "the claim of the plaintiff was a provable debt within the meaning of the Bankrupt Act."

Lamb vs. Brown arose under the Act of 1867, upon general demurrer to a replication to a plea of discharge in bankruptcy. Even if the point there decided were more nearly analogous to the questions here under review, the differences between the Act of 1867 and that of 1898 would suffice to render this decision inapplicable to the case at bar.

Carey vs. Mayer, involved only the question whether, under the Act of 1867, certain claims were provable in bankruptcy and therefore affected by the bankrupt's discharge.

White vs. How: Upon demurrer to a plea of discharge in bankruptcy under the Act of 1841, *held*, that the plea was sufficiently set out in accordance with the provisions of that Act.

Lathrop vs. Stewart involved the same question as *White vs. Howe*, *supra*, and was decided on the authority of that case.

Under Point III, pages 12–15.

Livingston vs. Oaksmith, decided in 1861 at Special Term, has no bearing, because the decision involved provisions of the State Insolvency Law, not analogous to the Bankrupt Act and of the Code of Procedure which are no longer in force in the State of New York, having been supplanted by the Sections of the Code of Civil Procedure set forth under Point IV, *supra* (p. 16).

In *Schermerhorn vs. Talman*, it was sought to avoid the effect of proceedings in bankruptcy under the Act of 1841 by alleging that the petition in bankruptcy was not sworn to before an officer authorized to administer oaths. The Court, while admitting that a party might attack the jurisdiction and affirmatively show that the proceedings were not had before officers duly authorized to act therein, sustained the regularity of the proceedings in question because of the absence of such affirmative showing and with the aid of a pre-

sumption that the Clerk of the Court would not do an unlawful act.

In *McCormick vs. Pickering*, defendant having pleaded a discharge in bankruptcy under the Act of 1841, in connection with which the proceedings leading up to the discharge were very fully set forth, and plaintiff having demurred to the plea for insufficiency, the court sustained the plea upon the ground that the facts pleaded showed a sufficient compliance with the requirements of the Act so as to confer jurisdiction on the bankruptcy court, which must thereafter be presumed to have acted with regularity.

In *Morse vs. Cloyes*, objections to the admission in evidence of a discharge in bankruptcy under the Act of 1841 were overruled on the ground that under that Act the bankruptcy court must be presumed to have had jusisdiction to grant the discharge until the contrary appears.

Small vs. Graves: A comparison of the state insolvency law, under which this case was decided and which is referred to in the quotation from the opinion on page 13, of the brief, will sufficiently show the inapplicability of the cited case, as authority here. Moreover, the fact of "intentional omission" of plaintiff's name from his schedules would deprive plaintiff in error of the aid of the cited case, even if otherwise parallel to the case at bar.

In *Hall vs. Robbins*, the Court, in sustaining the defence of a discharge under the insolvency laws of Massachusetts notwithstanding the omission of plaintiff's claim from the defendant's petition, such omission having been *admittedly* neither wilful nor fraudulent, did so because the insolvent (defendant) "had in all things conformed to the directions of such law." This case was decided in 1871, at which time the Massachusetts statute did not except from the bar of a discharge claims omitted from the debtor's petition or schedule of creditors. In 1897 the Massachusetts law was amended so as to except claims thus omitted. It is, of course, self-evi-

dent that no such analogy existed between the provisions of the Massachusetts Act of 1871 and the Bankruptcy Act of 1898 as to make the cited case of any importance upon the questions now before the court.

Rayl vs. Lapham turned upon the effect of proceedings in bankruptcy under the Act of 1867, had in strict compliance with the Act, as notice to a creditor endeavoring to assert his claim, notwithstanding the debtor's discharge in bankruptcy. Our comparison (Point II, *supra*), of the provisions of the Acts of 1867 and 1898, with reference to notice to creditors, sufficiently shows that the cited case is distinguishable. In fact it is unnecessary to do more than read the quotation from the opinion of the Court, on page 13 of our adversary's brief, to make this clear, especially if the quotation which plaintiff in error has cut short in the middle of a sentence be continued as the same appears on p. 458 of the report, as follows, a comma taking the place of the period appearing in the brief:

> "when he is found to have honestly complied with the requirements of the Act. If, by wilfully making false schedules or affidavits, he prevents notice to a creditor, his discharge may be annulled for this as well as for any other of the fraudulent acts enumerated in the 29th Section."

There is this further distinction to be observed in considering the decisions under the Act of 1867:

§34 of that Act provides that the discharge shall

> "with the exceptions aforesaid release the bankrupt from all debts" etc.

The "exceptions" are set forth in §33.

§29 provides that for certain causes a discharge shall be refused.

Excepting for §§29 and 33, the discharge is *absolute as to all provable debts.*

Neither of these sections except from the operation of the discharge a debt which has not been scheduled, or

the claim of a creditor not a party, and having no knowledge of the proceeding.

Per contra, §17 of the Act of 1898, as already pointed out, *expressly excepts* all such claims from the discharge.

In *Jarecki Mfg. Co.* vs. *McElwaine* (Brief, page 15) plaintiff having demurred to defendant's plea which set out, in considerable detail, proceedings resulting in a discharge in bankruptcy, the court, in overruling the demurrer, say (italics ours):

> "In the determination of this demurrer the Court must assume that every step in the bankruptcy proceedings, prior to and at the time of the adjudication of discharge, was in all respects regular and in compliance with every requirement of the Bankruptcy Act. It must therefore *assume that notice was given to the* individual and partnership *creditors of the bankrupt*," etc.

It may be fairly inferred that upon a state of facts showing this presumption of notice to be without foundation, the court would have denied the efficacy of the discharge to bar the plaintiff's claim.

Under Point IV, page 17.

Shawhan vs. Wherritt: Without drawing attention to the many other particulars in which this case could be distinguished from the one at bar, it is sufficient to say that the case arose under the Act of 1841, and the court having found that "the public notice required by the act having been given," *held* that "the creditors must be treated as having notice of the proceedings and an opportunity to make their objections to them."

In re Watts is so utterly wide of any and every proposition here involved as to require no further comment.

Washington, October, 1904.

JULIUS J. FRANK,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 26.—October Term, 1904.

Clarence T. Birkett, Plaintiff in Error, vs. The Columbia Bank. } In error to the Supreme Court of the State of New York.

[November 28, 1904.]

Mr. Justice McKenna delivered the opinion of the Court.

This is an action on a promissory note for $750. The defense is discharge in bankruptcy. The making of the note was admitted, and the only question presented is the effect of the discharge.

The facts as found by the court are: Plaintiff in error and one Calvin Russell, who died before the commencement of this action, were partners doing business under the name of Russell & Birkett, and in that name made and delivered to the Manhattan Railway Advertising Company a promissory note for $750. The latter company endorsed the note to defendant in error, of which Russell & Birkett had knowledge before its maturity. On the 13th of April, 1899, the firm of Russell & Birkett and plaintiff in error, upon their own petition, were adjudicated bankrupts in the United States District Court for the Northern District of New York, and were discharged September 12, 1899. The claim of defendant in error was not scheduled, either as a debt of the firm or of plaintiff in error, in time for proof and allowance with the name of the defendant in error, though defendant in error was known at the time of filing the schedules to be the owner and holder thereof by plaintiff in error, and that defendant in error had no notice or actual knowledge or other knowledge of the proceedings in bankruptcy prior to the discharge of the bankrupts. No notice of the proceedings in bankruptcy was at any time given to defendant in error by, or by the direction of, the bankrupts or either of them. It was decided that the claim of defendant in error was not barred by the discharge in bankruptcy, and judgment was directed for defendant in error.

The judgment was successively confirmed by the appellate division of the Supreme Court and the Court of Appeals. (174 N. Y. 112.) There upon judgment was entered in the Supreme Court in accordance with the direction of the Court of Appeals. This writ of error was then sued out.

Section 7 of the Bankrupt Law of 1898 devolves a number of duties upon the bankrupt, all directed to the purpose of a full and unreserved ex-

position of his affairs, property and creditors. Among his duties he is required to "prepare make oath to, and file in the court, within ten days . . . a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and the list of his creditors, showing their residences, if known; if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee. . . ." To the neglect of this duty the law attaches a punitive consequence. Section 17 provides: "A discharge in bankruptcy shall release a bankrupt of all of his provable debts, except such . . . have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy . . ."

But plaintiff in error urges that defendant in error did have actual knowledge of the proceedings in bankruptcy, and that Congress contemplated that there might be an intentional or inadvertent omission of the names of creditors from the schedule of debts, and provided against it by other provisions of the law, especially by that which makes it the duty of the referee to give notice to creditors, (sec. 38,) and by that which imposes the duty on the bankrupt to appear at the meeting of creditors for examination.

The finding of the trial court is that defendant "had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy prior to the discharge of the bankrupt therein." This is made more definite as to time by the Court of Appeals. Defendant in error, upon making an inquiry by letter November 6, 1899, about Russell & Birkett, was informed that they had gone through bankruptcy, and subsequently, (November 17,) the Northern District was given as the district of the proceedings. The discharge was September 12, 1899. Knowledge, therefore, it is contended, came to defendant in error in time to prove its claim, (section 65,) and to move to revoke the discharge of the bankrupt, (section 15). It is hence argued that defendant in error must be held to have had "actual knowledge of the proceedings in bankruptcy," as those words of section 17 must be construed. We do not think so, nor is that construction supported by the other provisions of the law urged by plaintiff in error. Actual knowledge of the proceedings contemplated by the section is a knowledge in time to avail a creditor of the benefits of the law—in time to give him an equal opportunity with other creditors—not a knowledge that may come so late as to deprive him of participation in the administration of the affairs of the estate or to deprive him of dividends, (section 65). The provisions of the law relied upon by plaintiff in

error are for the benefit of creditors, not of the debtor. That the law should give a creditor remedies against the estate of a bankrupt, notwithstanding the neglect or default of the bankrupt, is natural. The law would be, indeed, defective without them. It would also be defective if it permitted the bankrupt to experiment with it—to so manage and use its provisions as to conceal his estate, deceive or keep his creditors in ignorance of his proceeding without penalty to him. It is easy to see what results such looseness would permit—what preference could be accomplished and covered by it.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.